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## Comments

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## COMMENTS

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### THE NEWSMAN'S PRIVILEGE AFTER BRANZBURG V. HAYES: WHITHER NOW?

Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate for a moment to prefer the latter.

THOMAS JEFFERSON

In the 1972 case of *Branzburg v. Hayes*,<sup>1</sup> the Supreme Court ruled that requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedoms of speech and press guaranteed by the first amendment. The national press responded to this ruling in an "orgy of self pity,"<sup>2</sup> the many apocalyptic accounts of the decision suggesting an early arrival of 1984.<sup>3</sup> It is both predictable and fortunate that the *Branzburg* holding is less destructive of first amendment freedoms than these accounts suggest.<sup>4</sup> The precise implications of the case, however, is a question that lawyers and law professors will debate for years.<sup>5</sup> It is the purpose of this comment to make an early contribution to that debate. Section one will outline the decision in *Branzburg v. Hayes*, isolating the arguments addressed by the Court and delineating the limits of the holding. Section two will put the question of a newsman's privilege in historical perspective, suggesting that the Supreme Court's reasoning in *Branzburg* is in accord with that history. Section three will present

an argument in favor of a limited newsman's privilege which differs in crucial respects from the arguments heretofore presented to the courts, which is consistent with the historical considerations that properly proved persuasive to the majority in *Branzburg*, and which, accordingly, is likely to garner judicial acceptance.

#### I. THE HOLDING IN *Branzburg v. Hayes*

In *Branzburg v. Hayes*, the Supreme Court reviews four cases which raise in varied contexts the single issue of whether the Constitution guarantees to newsmen<sup>6</sup> a qualified privilege to withhold grand jury testimony. The writ of certiorari in No. 70-85<sup>7</sup> brought before the Court two judgments of the Kentucky Court of Appeals, both involving Paul Branzburg, a staff reporter for the Courier-Journal of Louisville, Kentucky. The first judgment<sup>8</sup> denied a petition for prohibition and mandamus against a trial court order that Branzburg appear before a Jefferson County grand jury and identify certain individuals he had seen possessing marijuana and making hashish. The second judgment<sup>9</sup> rejected Branzburg's petition to quash a summons directing his appearance before a Franklin County grand jury investigating narcotics violations. The writ of certiorari in No. 70-94<sup>10</sup> initiated High Court review of *In re Pappas*,<sup>11</sup> wherein the Supreme Judicial Court of Massachusetts upheld the denial of a newsman's motion to quash a summons requiring his presence

<sup>1</sup> 408 U.S. 665 (1972).

<sup>2</sup> Blasi, *The Justice and the Journalist*, 215 NATION 198 (1972) [hereinafter cited as Blasi, NATION].

<sup>3</sup> See, e.g., Anderson, *High Court Attacks Freedom of Press*, Chicago Daily News, Dec. 1, 1972, at 15, col. 1 (judge is "upholding the power of the government, Kremlin-like, to control the flow of information to the people"); Breslin, *A Silent Assault on the First Amendment*, Chicago Sun-Times, Nov. 11, 1972, at 26, col. 1 ("a persistent, silent, evil, vicious assault on the rights of the people"); Oliphant, *The First Amendment (amended)*, Chicago Sun-Times, Oct. 24, 1972, at 38, col. 3 (political cartoon); N.Y. Times, Nov. 17, 1972, at 46, col. 1 (constitutional protections for freedom of the press are being "hacked away"); cf. Seattle Post-Intelligencer, June 17, 1966, at —, col. —, quoted in Beaver, *The Newsman's Code, the Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243, 249 n.32 (1968). But see Kilpatrick, *Press Has Come a Long Way in Freedom Quest*, Chicago Daily News, Dec. 2-3, 1972, at 12, col. 6.

<sup>4</sup> Blasi, NATION.

<sup>5</sup> *Id.*

<sup>6</sup> It is exceedingly difficult to define the term "newsman." See text accompanying note 255 *infra*.

<sup>7</sup> 402 U.S. 942 (1971).

<sup>8</sup> *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1970), modified on denial of rehearing, 461 S.W.2d 345 (1971).

<sup>9</sup> Apparently, the second judgment against Paul Branzburg was not reported at the lower level. See 408 U.S. at 671 & n.6.

<sup>10</sup> 402 U.S. 942 (1971).

<sup>11</sup> — Mass. —, 266 N.E.2d 297 (1971).

before a grand jury which was apparently investigating Black Panther involvement in a prior civil disturbance. The writ of certiorari in No. 70-57<sup>12</sup> involved *Caldwell v. United States*,<sup>13</sup> a decision of the Ninth Circuit Court of Appeals which had inspired much hope among proponents of a newsman's privilege<sup>14</sup> by reversing the contempt citation of a reporter who refused to appear before a federal grand jury despite the existence of a protective order limiting the permissible range of questioning.<sup>15</sup>

Petitioners Branzburg and Pappas and respondent Caldwell asserted that confidential news sources are measurably deterred when newsmen are required to appear and testify before a grand jury. They further maintained that the resultant detrimental impact on the free flow of information to the public is inconsistent with first amendment guarantees. Concluding that the alleged infringement of Constitutional freedoms could not be justified unless necessitated by a compelling governmental interest, the reporters urged that they should not be forced to appear or testify before a grand jury until it is established that: (1) there are sufficient grounds for believing that the reporter possesses information relevant to the grand jury investigation; (2) such information is unavailable from other sources; and (3) the need for such information is "sufficiently compelling to override the claimed invasion of First Amendment

interests."<sup>16</sup> The Supreme Court refused to impose this tripartite burden upon the government and ruled that newsmen are not constitutionally immune from grand jury subpoenas. Consistent with this ruling, the Court affirmed in Nos. 70-85 and 70-94, and reversed in No. 70-57.

Certain ambiguities complicate any effort to outline the limitations of the holding in *Branzburg v. Hayes*. These ambiguities inhere in the structuring of the majority opinion, the peculiar status of Mr. Justice Powell's concurring opinion, and the uncertain light cast by the two dissenting opinions.

Mr. Justice White, writing for the Court, discusses numerous arguments, but no single argument or group of arguments is isolated as being determinative of the ultimate issue. The disposition of the four cases being reviewed is summary in form and is prefaced with the remark that the results follow from what has been said.<sup>17</sup> Since the implications vary according to the weight attached to each of the various arguments posited, the White opinion invites conflicting interpretations.<sup>18</sup>

This ambiguity is compounded by the peculiar status of a separate opinion by Mr. Justice Powell. Justice Powell formally joined the majority opinion, and his concurring opinion is written for the stated purpose of emphasizing "the limited nature of the Court's holding."<sup>19</sup> Although the Powell opinion is characterized as "enigmatic" by Mr. Justice Stewart,<sup>20</sup> it seems to adumbrate a constitutional standard substantially more protective of the newsman than that envisioned by Mr. Justice White. Moreover, since Powell's vote was pivotal, his understanding of the majority view may prove controlling in future adjudication.<sup>21</sup>

The two dissenting opinions are of scant assistance in ascertaining the subtle nuances of the majority opinion which will guide the course of subsequent litigation. In his dissenting opinion, Mr. Justice Douglas posits the thesis that the

<sup>12</sup> 402 U.S. 942 (1971).

<sup>13</sup> 434 F.2d 1081 (9th Cir. 1970).

<sup>14</sup> See, e.g., Comment, *Confidentiality of News Sources: Emerging Constitutional Protection*, 60 GEO. L.J. 867, 1082 (1972); Comment, *The Newsman's Qualified Privilege Under the First Amendment*, 16 S. DAK. L. REV. 328, 346 (1971).

<sup>15</sup> The protective order was granted by the court in *In re Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970). The order specifically provided:

(2) That . . . Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given to him for publication or public disclosure; (3) That . . . Mr. Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury. . . . (5) That the Court will entertain a motion for modification of this order at any time upon a showing by the government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means.

...

*Id.* at 362. The Government did not appeal this protective order. Comment, *Confidentiality of News Sources*, *supra* note 14, at 1083 n.1243.

<sup>16</sup> 408 U.S. at 680; cf. *People v. Dohrn*, Crim. No. 69-3808 (Cir. Ct. Cook Cty., Ill. May 20, 1970); Comment, *Confidentiality of News Sources*, *supra* note 14, at 1093 n.1301; Note, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed*, 35 NEB. L. REV. 562, 580 (1956); Note, 46 N.Y.U.L. REV. 617, 631 (1971).

<sup>17</sup> 408 U.S. at 708.

<sup>18</sup> Blasi, NATION.

<sup>19</sup> 408 U.S. at 709 (Powell, J., concurring).

<sup>20</sup> 408 U.S. at 725 (Stewart, J., dissenting).

<sup>21</sup> Blasi, NATION; cf. *A Nixon Court Scorecard*, HARPER'S, Dec. 1972, at 30: "Powell has not yet disagreed with his Nixon colleagues where his vote would have changed the result of any case."

first and fifth amendments, considered in conjunction, guarantee to the newsman an absolute testimonial privilege.<sup>22</sup> Since he claims that this privilege cannot be constitutionally denied under any circumstance, Douglas does not consider the possible contours of a limited privilege.

Somewhat more helpful in this respect is the dissenting opinion of Mr. Justice Stewart, joined by Justices Brennan and Marshall. The Stewart dissent accords with the majority view in rejecting an absolute newsman's privilege,<sup>23</sup> but differs as to the circumstances which justify compulsory testimony.<sup>24</sup> Although Justice Stewart summarizes his understanding of the protections afforded by the White opinion,<sup>25</sup> he casts little light on the holding. Stewart suggests that the majority has rejected any newsman's privilege<sup>26</sup> and thus would permit governmental fishing expeditions at the expense of the press;<sup>27</sup> these conclusions, however, are contrary to explicit disclaimers in the White<sup>28</sup> and Powell<sup>29</sup> opinions.

Notwithstanding these ambiguities, it is clear that *Branzburg v. Hayes* does not preclude a testimonial privilege for newsmen under any and all circumstances. Certain limitations on the hold-

ing are explicitly articulated by the Court,<sup>30</sup> and others are implicit in the factual situations presented for adjudication.

The primary protection for the reporter expressly recognized in the White opinion is that grand jury investigations must be made in "good faith."<sup>31</sup> One commentator has minimized the significance of this requirement by noting that the good faith standard "is a safeguard that all witnesses already enjoy, quite apart from the first amendment."<sup>32</sup> Notwithstanding this criticism, the requirement is of critical importance since it guards against the use of the grand jury subpoena power as a tool for harassing and punishing the press. Theoretically such abuse is improbable since the grand jury is an adjunct of the judiciary and not the executive.<sup>33</sup> In practical terms, however, there is a growing fear that the grand jury has become a rubber stamp of the executive, all but automatically following the direction of the prosecuting attorney.<sup>34</sup> Thus, one proponent of a federal statutory newsman's privilege insists that so long as "the Government possesses the right to subpoena reporters to compel disclosure of confidential information, it possesses the power to harass and intimidate the press."<sup>35</sup> Although direct evidence that this power is currently being abused is somewhat meager,<sup>36</sup> indirect evidence justifies concern: Law enforcement

<sup>22</sup> 408 U.S. at 712 (Douglas, J., dissenting).

<sup>23</sup> 408 U.S. at 744 (Stewart, J., dissenting).

<sup>24</sup> [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

408 U.S. at 743 (Stewart, J., dissenting) (footnotes omitted). Cf. D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 339 (1969); cases and materials cited note 16 *supra*.

<sup>25</sup> The crux of the Court's rejection of any newsman's privilege is its observation that only "where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas."

408 U.S. at 744 (Stewart, J., dissenting) (emphasis in original).

<sup>26</sup> *Id.*

<sup>27</sup> [The majority invites the government] to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify.

408 U.S. at 744 n.34 (Stewart, J., dissenting).

<sup>28</sup> 408 U.S. at 707.

<sup>29</sup> 408 U.S. at 709 (Powell, J., concurring).

<sup>30</sup> Since the majority ruled against the newsman in each of the four cases presented for review, the limitations articulated by the Court are, of course, *obiter dictum*.

<sup>31</sup> [N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issue for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.

408 U.S. at 707-08.

<sup>32</sup> Blasi, *NATION*.

<sup>33</sup> See, e.g., 408 U.S. at 708 (grand juries are subject to judicial control); *Sikle v. Commonwealth*, 133 Va. 789, 112 S.E. 605 (1922) (grand jury an adjunct of the court).

<sup>34</sup> Donner & Cerruti, *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*, 214 *NATION* 5 (1972).

<sup>35</sup> *Newsman's Privilege Legislation Called "Essential" to Preserve Free Press*, 12 *BNA CRIM. L. REP.* 2101, 2103 (Nov. 1, 1972); cf. Desmond, *The Newsman's Privilege Bill*, 13 *ALBANY L. REV.* 1, 8-9 (1949).

<sup>36</sup> As was stated by Rep. Robert Drinan (D-Mass) during recent congressional debates on a federal newsman's privilege, "If the *Branzburg* decision represented a day of infamy, we'd like to see some of the blood to justify this legislation." *House Subcommittee Concludes*

officials often have a vested interest in curtailing press activities;<sup>37</sup> in recent years there has been a vast increase in the number of subpoenas served upon the press;<sup>38</sup> and the secrecy of the grand jury can effectively cloak abuses by prosecuting attorneys.<sup>39</sup> In his dissenting opinion, Justice Douglas fears that the good faith standard will prove to be a hollow protection unless the Supreme Court is willing to penetrate the realities behind the government's exculpatory rationale.<sup>40</sup> If vigorously enforced, however, the good faith limitation can retard abuse of grand jury subpoena power and prevent harassment of the press.<sup>41</sup>

A second limitation enunciated in the White opinion is that grand jury questioning of news reporters must be relevant to the immediate investigation.<sup>42</sup> Unless adequately restrained, the grand jury has the power to "wildly spray members of an entire group with subpoenas," and to inquire

into matters wholly removed from its basic concerns.<sup>43</sup> Two dangers inhere in grand jury fishing expeditions. First, if the rules are "twisted into instruments for coercing the press into the role of government agents,"<sup>44</sup> public trust in the news media will be materially undermined.<sup>45</sup> Second, if the government is allowed to annex the news media as an investigative arm, the independence of the press will be seriously jeopardized.<sup>46</sup>

The relevancy standard is designed to insure that this legitimate concern does not become a disastrous reality. Justice Stewart contends that the standard is inadequate to the task, and that the Court erred in refusing to apply a meaningful "probable cause" requirement.<sup>47</sup> There is substantial support for the Stewart contention. First, as the majority admits, a grand jury investigation "may be triggered by tips, rumors, evidence proffered by the prosecution, or the personal knowledge of the grand jurors."<sup>48</sup> Second, the subject matter under investigation is often extremely broad and ill-defined, and the information sought from the reporter may be correspondingly unlimited.<sup>49</sup> Finally, there are significant legal barriers to asserting the irrelevancy of a grand jury question.<sup>50</sup>

The adequacy of the relevancy standard is ultimately dependent on judicial sensitivity to the needs of the press. On the one hand, where the grand jury is immune from judicial supervision, no standard, however strictly formulated, can prevent wholesale prosecutorial invasion of a newsman's files. The "reasonable likelihood test"<sup>51</sup> promul-

*Initial Hearings on Newsman's Privilege Bill*, 12 BNA CRIM. L. REP. 2081, 2083 (Oct. 25, 1972).

<sup>37</sup> 408 U.S. at 724 & n.12 (Douglas, J., dissenting); *Feiner v. New York*, 340 U.S. 315 (1951). Usually, the newspaper story giving rise to a press subpoena controversy is one charging some kind of public corruption, especially a failure to enforce the laws. See, e.g., *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936); Charles L. Leonard & Douglas Clark (unreported) EDITOR & PUBLISHER, Mar. 6, 1948, at 7; E. B. Chapman (unreported) N.Y. Times, Apr. 20, 1940, at 8, col. 4; Sherman Stambaugh (unreported) N.Y. Times, Sept. 13, 1939, at 19, col. 4; Desmond, *supra* note 35; Harvey, *Protection of News Sources in Pennsylvania*, 35 PENN. BAR ASSN. Q. 197, 203 (1964); Note, *The Journalist and His Confidential Source*, *supra* note 16, at 569 n.22; Comment, *Compulsory Disclosure of a Newsman's Source: A Compromise Proposal*, 54 NW. U.L. REV. 243, n.4 (1959); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 70 n.59 (1950).

<sup>38</sup> See Comment, *Confidentiality of News Sources*, *supra* note 14, at 1081; Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, n.1 (1970).

<sup>39</sup> Donner & Cerruti, *supra* note 34.

<sup>40</sup> *Id.* at 20. Insofar as Justice Douglas' warning is premised upon an evaluation of the political predilections of the Nixon Court, the question presented is beyond the scope of this comment. For an excellent discussion of the Nixon Court, see Bender, *The Techniques of Subtle Erosion*, HARPER'S, Dec. 1972, at 18, 26; Goldberg, *The Berger Court 1971 Term: One Step Forward, Two Steps Backward?*, 63 J. CRIM. L. & C. 463 (1972).

<sup>41</sup> See, e.g., Chicago Daily News, Feb. 17-18, 1973, at 8, col. 1 (editorial charges that FBI was under White House orders to "nail" reporter Les Whitten for his repeated disclosures of information embarrassing to the administration; grand jury refused to comply). But see *Punishment by Harassment*, 215 NATION 196 (1972).

<sup>42</sup> See note 25 *supra*.

<sup>43</sup> Donner & Cerruti, *supra* note 34, at 6.

<sup>44</sup> *Imprisoned Press*, N.Y. Times, Nov. 17, 1972, at 46, col. 1; Caldwell, *Ask Me. I Know. I Was the Test Case*, SAT. REV., Aug. 5, 1972, at 4, 5.

The FBI wanted to pick my brain. They wanted me to slip behind my news sources, to act like the double agents I saw on TV.

<sup>45</sup> Comment, *Confidentiality of News Sources*, *supra* note 14, at 1081 n.1234.

<sup>46</sup> Caldwell v. United States, 434 F.2d at 1086; Comment, *Confidentiality of News Sources*, *supra* note 14, at 1086 n.1261; Comment, *Government Investigations*, *supra* note 38, at 1199.

<sup>47</sup> 408 U.S. at 744 n.34.

<sup>48</sup> 408 U.S. at 701.

<sup>49</sup> Comment, *Government Investigations*, *supra* note 38, at 1199.

<sup>50</sup> See, e.g., Blair v. United States, 250 U.S. 273, 282 (1919), where the Court stated that a witness "is not entitled to urge objections of incompetence or irrelevancy, such as a party might raise, for this is no concern of his." See generally Comment, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97, 111-12 (1967).

<sup>51</sup> Disclosure of a newsman's information and sources is constitutional when there is a "reasonable likelihood"

gated by the Hawaii Supreme Court in *In re Goodfader's Appeal*<sup>52</sup> did not halt a purported fishing expedition by the plaintiff.<sup>53</sup> The more stringent "heart of the inquiry test"<sup>54</sup> utilized by the Second Circuit in *Garland v. Torre*<sup>55</sup> allowed the affirmation of an order which compelled disclosure of a news source of doubtful relevance to the proceedings.<sup>56</sup> Even the "compelling interest test"<sup>57</sup> outlined by the Ninth circuit in *Caldwell v. United States*<sup>58</sup> has proved a dubious protection: In *State v. Knops*<sup>59</sup> the Wisconsin Supreme Court held a reporter in contempt even though the information sought concerning a campus bombing had already been attained by alternative means.<sup>60</sup>

On the other hand, the relevancy standard was recognized at common law and sufficed to protect a number of recalcitrant newsmen from contempt citations for failure to testify.<sup>61</sup> Properly applied, the standard can continue to shield the reporter from prosecutorial abuse.<sup>62</sup> As one commentator has noted, lower court judges "who appreciate the need for a newsman's privilege should feel little constrained by *Branzburg v. Hayes*."<sup>63</sup>

A third limitation is expressly noted in the White opinion: The holding of the Court is subject to statutory modification. At the federal level, Congress has the power to fashion a statutory newsman's privilege "with standards and rules as narrow or broad as deemed necessary."<sup>64</sup> Similarly, state courts are free to "recognize a newsman's privilege, either qualified or absolute."<sup>65</sup> As one commentator has observed, Justice White not only leaves the door open for a statutory privilege, but at times seems to go so far as to recommend such legislation.<sup>66</sup> The judicial doctrine that

that the desired information will be relevant to the judicial subject of inquiry. For a discussion of the various tests utilized by the courts in weighing the competing interests in newsman's privilege cases, see Comment, *The Newsman's Privilege and the Constitution*, 23 *SOUTH CAR. L. REV.* 436 (1971); Note, *Reporters and Their Sources*, *supra* note 38, at 322-25.

<sup>52</sup> 45 *HAWAII* 317, 367 P.2d 472 (1961).

<sup>53</sup> Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 *N.W. U.L. REV.* 18, 23 (1969); Comment, *Constitutional Law: Privilege of Newsman to Conceal Source of Information*, 15 *OKLA. L. REV.* 453, 455 (1962).

<sup>54</sup> The question asked of the newsman must go to the heart of the inquiry.

<sup>55</sup> 259 F.2d 545 (2nd Cir.), *cert. denied*, 358 U.S. 910 (1958).

<sup>56</sup> See, e.g., *Adams v. Associated Press*, 46 F.R.D. 439, 441 (S.D. Tex. 1969), where the court quoted extensively from the *Garland* opinion in denying the requested privilege on the ground that taking a deposition was a necessary step in the preparation of a trial; Comment, *The Newsman's Qualified Privilege*, *supra* note 14, at 336.

testimonial privileges must be created by legislative action is a plausible justification for this recommendation.<sup>67</sup>

The language utilized by the majority in *Branzburg* is difficult to reconcile, however, with the sixth amendment guarantee that a defendant in a criminal action has the power to compel the compulsory testimony of witnesses.<sup>68</sup> It has been argued that the newsman's privilege is almost certainly limited by the defendant's right to compulsory testimony in a criminal trial.<sup>69</sup> Accordingly, some commentators have questioned the

<sup>57</sup> The newsman cannot be forced to testify in the absence of a compelling governmental interest.

<sup>58</sup> 434 F.2d 1081 (9th Cir. 1970).

<sup>59</sup> 49 *WIS.* 2d 647, 183 N.W.2d 93 (1971).

<sup>60</sup> Note, 55 *MARQ. L. REV.* 184, 188 (1972); Note, *Reporters and Their Sources*, *supra* note 38, at 326 n.40: "This interpretation of the compelling need tests suggests that disclosure could always be compelled during an investigation into possible criminal conduct." Cf. Comment, *Confidentiality of News Sources*, *supra* note 14, at 1087 n.1262: "What in an individual case will satisfy the 'compelling and overriding interest test' is not easily determined."

<sup>61</sup> See, e.g., *Rosenberg v. Carroll in re Lyons*, 99 F. Supp. 629 (S.D.N.Y. 1951) (since Lyon's statement was merely a paraphrase of known information, his source was irrelevant to the proceedings); William G. Cayce (unreported) *EDITOR & PUBLISHER*, Aug. 19, 1933, at 20 (held that since the grand jury had already found an indictment in the murder case, contempt order should be dismissed); A. L. Sloan (unreported) *EDITOR & PUBLISHER*, Jan. 9, 1932, at 7 (no contempt citation since Sloan had no evidence not already available to the prosecution).

<sup>62</sup> See note 40 *supra*.

<sup>63</sup> Blasi, *NATION*.

<sup>64</sup> 408 U.S. at 706.

<sup>65</sup> *Id.*

<sup>66</sup> Blasi, *NATION*, at 199.

<sup>67</sup> *In re Wayne*, 4 *HAWAII* Dist. Ct. 475 (1914) (it is not within the power of the courts to add to the list of privileged communications); *People ex rel. Phelps v. Fancher*, 2 *HUN.* 226 (N.Y. Sup. Ct. 1874) (privilege must be created by legislative action); Note, 22 *CORNELL L.Q.* 116, 119 (1936):

In a field so dominated by the social interest, which the legislatures rather than the courts are supposed to reflect, judicial legislation would seem particularly undesirable.

*cf. In re Pappas*, — *Mass.* at —, 266 N.E.2d at 302 (adoption of first amendment theory called judicial legislation). *But cf. D'Alemberte*, *supra* note 24, at 339 (any conditional privilege statute must depend on competent judicial administration); Semeta, *Journalist's Testimonial Privilege*, 9 *CLEVE.-MAR. L. REV.* 311, 322 (1960) (privilege question should be left in the sound discretion of the courts); Note, *The Right of a Newsman*, *supra* note 37, at 83 (legislation is not the proper method).

<sup>68</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining of witnesses in his favor." U.S. CONST. amend. VI. See *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment applies to the states).

<sup>69</sup> Comment, *The Newsman's Privilege and the Constitution*, *supra* note 51, at 460.

constitutionality of an absolute newsman's privilege statute.<sup>70</sup> In suggesting that federal legislation may be as broad as deemed necessary, and that state courts may recognize an absolute privilege, the White opinion does not intimate the necessity of a sixth amendment limitation.<sup>71</sup> Indeed, the Court seems to sanction the view that the sixth amendment was adopted to guarantee the defendant the same right of process as was provided at common law, and that, accordingly, the constitutional right, like its common law counterpart, is subject to statutory modification.<sup>72</sup> This argument is unpersuasive. If an absolute statutory privilege may be granted to newsmen, it can be extended to other occupational groups.<sup>73</sup> A constitutional guarantee which is subject to substantial legislative revision is a contradiction in terms.

In addition to the protections for the news media explicitly articulated by the Court, two important limitations on the *Branzburg* holding are implicit in the factual situations presented for adjudication. First, each of the four cases involved grand jury<sup>74</sup> investigation of suspected criminal activities.<sup>75</sup> Since even the opponents of a newsman's privilege recognize the rationale for a distinction,<sup>76</sup>

the *Branzburg* holding does not necessarily extend to civil actions.

In England today, reporters are not compelled to disclose their sources in private litigation against newspapers in the absence of "special circumstances."<sup>77</sup> Apparently, however, the English rule of privilege does not extend to criminal or administrative proceedings.<sup>78</sup> A similar distinction might be sustained in American law. Moreover, it is doubtful whether the right to compulsory testimony of witnesses guaranteed by the sixth amendment extends to civil litigants;<sup>79</sup> therefore, an argument can be made in support of a constitutional distinction between civil and criminal actions. The force of this contention is necessarily diminished, however, by the strong tradition of compulsory testimony in civil cases<sup>80</sup> and Wigmore's contention that the due process clause guarantees compulsory testimony in civil actions.<sup>81</sup>

Proponents of a constitutional newsman's privilege have suggested that news about public matters is more worthy of constitutional protection than information about private affairs<sup>82</sup> and that,

*Under the First Amendment*, 11 STAN. L. REV. 541, 545 (1949); Note, 61 MICH. L. REV. 184, 186 (1962).

<sup>77</sup> See *Georgius v. Vice Chancellor of Oxford University Press*, 1 K.B. 729 (1949); *Lawsen & Harrison v. Odhams Press, Ltd.*, 1 K.B. 129 (1949); *Lyle-Samuel v. Odhams, Ltd.*, 1 K.B. 135 (1920); *Adams v. Fisher*, 110 T.L.R. 537 (C.A. 1914); *Plymouth Mutual Cooperative v. Traders Publishing Ass'n, Ltd.*, 1 K.B. 403 (1906); *Hope v. Brash*, 2 Q.B. 188 (1897); *Pope-Hennessy v. Wright*, 24 Q.B.D. 445 (1888); *Horle v. Cathedral*, 14 L.T.R. 801 (1866).

<sup>78</sup> D'Alemberte, *supra* note 24, at 311 & n.19.

<sup>79</sup> Guest & Stanzler, *supra* note 53, at 51:

In such cases as *Time, Inc. v. Hill* [385 U.S. 374 (1967)] the Supreme Court indicated its willingness to sacrifice an individual's interest in recovery for society's strong interest in freedom of the press.

Comment, *Government Investigations*, *supra* note 38, at 1227; Note, 72 HARV. L. REV. 768, 769 (1959); Note, MARQ. L. REV., *supra* note 60, at 189; Note, 61 MICH. L. REV. 184, 185 n.5 (1962). Cf. Comment, *Confidentiality of News Sources*, *supra* note 14, at 1097 n.1321.

<sup>80</sup> *Garland v. Torre*, 259 F.2d at 549:

[A]t the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States.

Cf. *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Wilson v. United States*, 221 U.S. 361 (1911); *Blair v. United States*, 250 U.S. 273, 279-81 (1919).

<sup>81</sup> 8 J. WIGMORE, EVIDENCE § 2191 (McNaughton rev. 1961). Cf. Beaver, *supra* note 3, at 257:

[I]t is difficult to single out anything more fundamental to the guarantee of due process of law provided by the fifth and fourteenth amendments.

<sup>82</sup> D'Alemberte, *supra* note 24, at 338; Note, 82 HARV. L. REV. 1384, 1386 (1969).

<sup>70</sup> Fifteen-month study conducted by the American Civil Liberties Union, reported in N.Y. Times, Mar. 18, 1959, at 75, col. 1 (state privilege statutes are not likely to survive constitutional test). Cf. Note, *Reporter Denied Privilege Against Disclosure of News Source*, 20 OHIO ST. L.J. 382, 383 (1959) (by withholding the identity of his source, the journalist defeats the public and private right of access to due process). But see *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953) (court rejected argument that such statutes are unconstitutional); Comment, *The Newsman's Qualified Privilege*, *supra* note 14, at 332 (it is apparent that such privileges are constitutionally sound).

<sup>71</sup> 408 U.S. at 706.

<sup>72</sup> Note, *Reporters and Their Sources*, *supra* note 38, at 346 n. 131:

Although the Sixth Amendment grants the defendant the right of compulsory process, that Amendment was adopted to guarantee the defendant the same right of process as that provided the prosecution by common law. This right to compulsory process does not override exemptions from disclosure protected by . . . statutes . . .

Cf. 8 J. WIGMORE, EVIDENCE § 2191 (McNaughton rev. 1961). See generally Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

<sup>73</sup> The situation would be otherwise, of course, if the legislative power to grant an absolute newsman's privilege were grounded in freedom of the press. Such is not the argument. See note 72 *supra*.

<sup>74</sup> The decision in *Branzburg v. Hayes* does not technically extend to trial situations. However, since the public interest in a trial certainly equals the public interest in a grand jury proceeding, this seems to be a distinction without a difference.

<sup>75</sup> 408 U.S. at 667-79.

<sup>76</sup> See, e.g., Comment, *Confidentiality of News Sources*

accordingly, greater protection in the form of a newsman's privilege is appropriate in the former situation.<sup>83</sup> Paradoxically, should the Supreme Court eventually uphold a higher degree of protection for the reporter in civil actions,<sup>84</sup> the distinction will probably be based on the contention that the lesser public interest in private litigation justifies greater constitutional protection for the newsman.<sup>85</sup> In summary, the *Branzburg* holding is limited by its facts to criminal investigation. Particular arguments—the analogy to English law, the sixth amendment distinction, and the greater public interest in criminal cases—justify the conclusion that the *Branzburg* holding should not be extended to civil litigation.

The holding in *Branzburg v. Hayes* is further limited to the denial of a testimonial privilege at the threshold of a grand jury investigation, with one narrow exception.<sup>86</sup> The decision does not preclude the successful assertion of a constitutional privilege after the grand jury has had an opportunity to frame specific questions. Although not expressly recognized in the White opinion,<sup>87</sup> this limitation inheres in the factual situations presented for judicial review.

Reporters Pappas, Caldwell and Branzburg each claimed a constitutional right to refuse to appear before the grand jury until the government had met certain preconditions.<sup>88</sup> Owing to the threshold nature of the claim, the record pre-

sented to the High Court in *Pappas* was meager. The nature of the grand jury investigation was not ascertained; the questions Pappas would be asked to answer were unknown. Indeed, it was not even clear that he would be asked to divulge information received in confidence.<sup>89</sup> In *Caldwell*, the Supreme Court had an opportunity<sup>90</sup> to review the propriety of an underlying protective order which narrowed the scope of permissible grand jury interrogation.<sup>91</sup> Instead, the Court chose to limit its ruling to the immediate question of whether or not Caldwell could refuse to present himself before the grand jury.<sup>92</sup>

The two cases involving petitioner Branzburg<sup>93</sup> differ from *Caldwell* and *Pappas* in that Branzburg was protected by the Kentucky reporter's privilege statute.<sup>94</sup> The Kentucky court of appeals ruled that this statute does not prevent compelling a reporter to identify the perpetrators of a crime which he has witnessed.<sup>95</sup> Inasmuch as Branzburg was otherwise immune from compulsory testimony, the issue on appeal was narrowly and specifically framed. In denying the asserted privilege, therefore, the Supreme Court went beyond the question of threshold requirements. However, since the public interest in effective law enforcement is particularly compelling when the reporter has witnessed a crime, the ruling does not necessitate the denial of a privilege in other contexts. With this narrow exception, the holding in *Branzburg v. Hayes* merely restricts the reporter's right to challenge "the state's very authority to subpoena him."<sup>96</sup>

The preceding analysis of the holding in *Branzburg v. Hayes* may be summarized as follows: In the absence of statutory protection, a reporter may not assert a testimonial privilege at the thresh-

<sup>83</sup> Note, *Reporter Denied Privilege*, *supra* note 70, at 383 n.8. Cf. Guest & Stanzler, *supra* note 53, at 54.

<sup>84</sup> See Chicago Daily News, Jan. 15, 1973, at 7, col. 2.

<sup>85</sup> Throughout the majority opinion in *Branzburg*, primary emphasis is placed on the public interest in the detection of crime. See, e.g., the discussion of imprisonment, 408 U.S. at 696. Cf. the following remarks made by President Nixon at a recent press conference:

[W]hen you go to the question of revealing sources, then I take a very jaundiced view of that kind of action. Unless, unless it is strictly—and this would be a very narrow area—strictly in the area where a major crime had been committed and where the subpoenaing of the notes had to do with information dealing directly with that crime.  
N.Y. Times, May 2, 1971, at 66, col. 3.

<sup>86</sup> See text accompanying note 96 *infra*.

<sup>87</sup> Note, however, the following language from Justice Powell's concurring opinion:

The newsman witness, like all other witnesses, will have to appear . . . Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case.

408 U.S. at 710 n.\*.

<sup>88</sup> See Blasi, NATION.

<sup>89</sup> 408 U.S. at 709.

<sup>90</sup> Comment, *Confidentiality of News Sources*, *supra* note 14, at 1083 n.1246.

<sup>91</sup> See note 15 *supra*.

<sup>92</sup> "Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance." 408 U.S. at 708.

<sup>93</sup> See text accompanying notes 8 & 9 *supra*.

<sup>94</sup> Ky. REV. STAT. § 421.100 (1962).

<sup>95</sup> 461 S.W.2d at 345.

<sup>96</sup> 408 U.S. at 710 n.\* (Powell, J., concurring). Cf. Blasi, NATION:

The Powell opinion, which it must be stressed again is the controlling opinion, leaves open the possibility that newsmen in positions such as Caldwell, Branzburg and Pound found themselves might yet be privileged to keep important source confidences intact if they cooperated with grand jury probes up to a point.



old of a grand jury investigation into criminal activities, provided that the subpoena was issued in good faith to procure relevant information.

## II. THE NEWSMAN'S PRIVILEGE IN HISTORICAL PERSPECTIVE

Liberty, in each of its phases, has its history and connotation.

Near v. Minnesota<sup>97</sup>

The long and relentless struggle waged by newsmen seeking a privilege of confidential communication traces back to the days of Benjamin Franklin's apprenticeship in the newspaper business.<sup>98</sup> In the course of two hundred years, the newsmen have been defeated on every conceivable ground.<sup>99</sup> One commentator has characterized the fifth amendment privilege as "a doctrine in search of a reason,"<sup>100</sup> the newsmen's privilege is best characterized as a reason in search of a doctrine.

### *The Newsmen's Privilege as a Common Law Right*

A privilege, in its Latin derivation, is a privy law, granting a special favor or immunity. In a sense, it is the opposite of a law, which is equally applicable to all.<sup>101</sup> A testimonial privilege is in derogation of the doctrine that the public has a right to every man's evidence.<sup>102</sup> Accordingly, it is appropriate to begin an historical analysis of the newsmen's privilege with a discussion of the origin and nature of this doctrine.

The duty to testify was recognized early in the development of English law.<sup>103</sup> By the Act of Elizabeth in 1562, service of process could be had out of any court of record requiring the person served to testify concerning any cause pending in the court.<sup>104</sup> In the *Countess of Shrewsbury's Case* in 1612, Lord Bacon proclaimed that "all subjects,

<sup>97</sup> 283 U.S. 697, 798 (1931).

<sup>98</sup> THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Yale Univ. Press 1964).

<sup>99</sup> Comment, *The Newsmen's Qualified Privilege*, *supra* note 14, at 348.

<sup>100</sup> W. SCHAEFER, *THE SUSPECT AND SOCIETY* 61 (1967).

<sup>101</sup> Beaver, *supra* note 3, at 245.

<sup>102</sup> The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that rule.

*People ex. rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1935).

<sup>103</sup> See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, 325-26 (7th ed. 1966); 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, 192-93 (7th ed. 1966); *Blair v. United States*, 250 U.S. 273, 279-80 (1919).

<sup>104</sup> 5 Eliz., c. 9 § 12 (1562).

without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."<sup>105</sup> Wigmore suggests that the duty to testify was reinforced by the glorious revolution of 1688,<sup>106</sup> and by 1843 Jeremy Bentham was able to assert that not even the Prince of Wales could refuse to testify if properly summoned by a chimney-sweeper or a barrow-woman.<sup>107</sup>

The maxim that the public has a right to every man's testimony is equally engrained in the American judicial system. In criminal cases, the right to compulsory process is guaranteed by the sixth amendment; in civil cases, the right probably inheres in fifth amendment due process.<sup>108</sup> Moreover, as the Supreme Court noted in *Blair v. United States*,<sup>109</sup> the compulsion of witnesses is recognized as incident to the judicial power of the United States.

Judicial emphasis on the duty to testify is justified by two considerations. First, the right to sue and defend in the courts is the alternative of force. Since the peaceful settlement of disputes demands that individuals disclose their knowledge of relevant matter, the testimonial duty is "a natural and elementary obligation which must be met if our judicial system is to function in . . . an orderly manner."<sup>110</sup> In this respect, the duty to testify is conceived as a duty owed not to any one person or set of persons, but to the community as a whole.<sup>111</sup>

<sup>105</sup> 12 Coke 94 (1613). See also *Bulstrud v. Letchmere*, Freem. Ch. 5 (1676); *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682).

<sup>106</sup> 8 J. WIGMORE, *EVIDENCE* §§ 2190-97 (McNaughton rev. 1961).

<sup>107</sup> 4 THE WORKS OF JEREMY BENTHAM 320 (Bowring ed. 1843).

<sup>108</sup> See notes 80 & 81 *supra*. But cf. note 79 *supra*.

<sup>109</sup> 250 U.S. at 279-81. Cf. *Garland v. Torre*, 259 F.2d at 548 (duty to testify "has roots fully as deep in our history as does the guarantee of a free press."); *Townsend v. United States*, 95 F.2d 352, 361 (1938) (witness may be punished for mistakes of law in refusing to answer). But see Comment, *Government Investigations*, *supra* note 38, at 1218-19.

The interest in compelling testimony has never been as "fundamental" or "paramount" as these courts assumed. Both common law and statute have long recognized numerous privileges against compelled testimony, and if these same cases had arisen in a statutory newsmen's privilege state, the courts would have applied the privilege, any "fundamental" or "paramount" interest notwithstanding.

<sup>110</sup> Note, MARQ. L. REV., *supra* note 60, at 184; cf. *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907); *Bennet v. Waller*, 23 Ill. 97, 101 (1859).

<sup>111</sup> *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (dictum); 8 J. WIGMORE *EVIDENCE* 66 (3rd ed. 1940).

A second justification for emphasis on the testimonial duty stems from the basic concept that courts of justice must be armed with the power to discover truth.<sup>112</sup> It has been said that the manifest destiny of the law of evidence is a progressive lowering of the barriers to truth.<sup>113</sup> Not surprisingly, therefore, trial lawyers have vociferously attacked even the traditional testimonial privileges.<sup>114</sup>

The modern requisites for the establishment of a common law privilege are embodied in Wigmore's classic formula:

- (1) The communications must originate in a confidence that they will not be disclosed. (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>115</sup>

Wigmore's criteria have been approved in a number of judicial decisions.<sup>116</sup> Even where the courts are not explicit in citing Wigmore, the grounds which they give for denying the testimonial privilege invariably indicate a failure to meet at least one of the four conditions.<sup>117</sup>

The common law recognizes a privilege for the

attorney-client relationship,<sup>118</sup> for husband and wife,<sup>119</sup> for child and parent,<sup>120</sup> for government informers,<sup>121</sup> and for fellow jurors.<sup>122</sup> In addition, most state legislatures have added doctor-patient<sup>123</sup> and priest-penitent<sup>124</sup> to the list. In each instance, the privilege of nondisclosure is purportedly justified as a prophylactic device to insure full effectuation of a socially desirable relationship.<sup>125</sup>

The newsmen's privilege is often dismissed as a novelty,<sup>126</sup> and the large majority of common law decisions have denied the reporter's request for privilege.<sup>127</sup> The case most often cited in this con-

<sup>118</sup> See *Drolshagen v. Drolshagen*, 230 Mich. 444, 202 N.W. 959 (1925); *Rooney v. Maryland Casualty Co.*, 184 Mass. 26, 67 N.E. 882 (1903); *Getzlaff v. Seliger*, 43 Wis. 297 (1877); *Dennis v. Codrington*, Cary 143 (Ch. 1580) (a counsellor is not to be examined of any matter, wherein he hath been of counsel); *Berd v. Lovelace*, Cary 88 (Ch. 1577) (solicitor exempted from examination). See generally Symposium, *Evidentiary Privileges in Illinois—Attorney Client Privilege*, 46 CHI.-KENT L. REV. 35 (1969); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

<sup>119</sup> See *State v. Robbins*, 33 Wash. 2d 370, 213 P.2d 310 (1950); *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1940); *Menefee v. Commonwealth*, 189 Va. 900, 55 S.E.2d 9 (1940); *Hopkins v. Grimshaw*, 165 U.S. 342 (1897). See generally Guarnieri, *Husband-Wife Privileged Communications, Summarized*, 8 CLEV.-MAR. L. REV. 531 (1959).

<sup>120</sup> See generally Coburn, *Child-Parent Communication: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1970).

<sup>121</sup> *Roviano v. United States*, 353 U.S. 53 (1957); 8 J. WIGMORE, EVIDENCE §2374 (McNaughton rev. 1961).

<sup>122</sup> *Burns International Detective Agency v. Holt*, 138 Minn. 165, 164 N.W. 590 (1917); *Ward Baking Co. v. Western Union*, 205 App. Div. 723, 200 N.Y. Supp. 865 (1923).

<sup>123</sup> See Note, *NOTRE DAME LAWYER*, *supra* note 114, at 490. See generally C. DEWITT, *PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT* (1958); *Slovenko, Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960); *Stewart, Physician-Patient Privilege in Ohio*, 8 CLEV.-MAR. L. REV. 444 (1959); *Welch, Another Anomaly—The Patient's Privilege*, 13 MISS. L.J. 137 (1941).

<sup>124</sup> Note, *NOTRE DAME LAWYER*, *supra* note 114, at 490. See generally 8 J. WIGMORE, EVIDENCE §2395 (McNaughton rev. 1961).

<sup>125</sup> Coburn, *supra* note 120, at 603. See generally Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285 (1943); *Morgan & Maguire, Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937); *Platz, Various Privileges*, 1945 WIS. L. REV. 239; Note, *Privileged Communications—Some Recent Developments*, 5 VAND. L. REV. 590 (1952).

<sup>126</sup> See, e.g., 63 ABA REPORTS 570, 595 (1938).

<sup>127</sup> See, e.g., *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913). For a comprehensive list of those cases which have refused to recognize a common law privilege for

[T]he right merely happens to be exemplified in the case of *Doe v. Roe*; that is all. The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness.

<sup>112</sup> See *People ex rel. Phelps v. Fancher*, 2 Hun. 226, 230-31 (N.Y. Sup. Ct. 1874); *People ex rel. Foote v. Clark*, 283 Ill. 221, 119 N.E. 329 (1918); *Barnhart, Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377 (1950) (accent of the law is upon perception, knowledge, authenticity); STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., *THE NEWSMAN'S PRIVILEGE* (Comm. Print 1966).

<sup>113</sup> MCCORMICK, EVIDENCE 165 (1954).

<sup>114</sup> See, e.g., CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 496 (1947) (trend of the best legal judgment is away from all occupational privileges); CONRAD, 2 MODERN TRIAL EVIDENCE 256 (1956); 1949 N.Y. LAW REVISION COMM'N REP. 130 (scarcely a single presently recognized privilege of concealing the truth that will bear rational analysis); Gallup, *Further Consideration of a Privilege for Newsmen*, 14 ALBANY L. REV. 16 (1950); Note, 39 NOTRE DAME LAWYER 489, 492 (1964).

<sup>115</sup> 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961) (emphasis in original).

<sup>116</sup> See, e.g., *United States v. Funk*, 84 F. Supp. 967 (1949); *Scolavino v. State*, 187 Misc. 253, 62 N.Y.S.2d 17 (Ct. Cl. 1946); *State v. Smythe*, 25 Wash. 2d 161, 169 P.2d 706 (1946).

<sup>117</sup> Guest & Stanzler, *supra* note 53, at 26 n.46.

nection is *People ex rel. Mooney v. Sheriff of New York County*,<sup>128</sup> wherein the court maintained that the "policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail." Before concluding, however, that the common law door to a newsman's privilege is closed,<sup>129</sup> it is important to note that the arguments heretofore presented to the courts have failed to present the newsman's case in its most favorable light and that the common law courts have not been altogether unresponsive to the reporter's needs.

In presenting his case before the common law courts, the newsman has most often stressed the dictates of the Newspaper Code of Ethics as justification for a testimonial privilege.<sup>130</sup> Courts which have considered the contention, however, have unanimously given priority to legal considerations over ethical rules.<sup>131</sup> Proponents of a newsman's privilege have also urged that a testimonial privilege is essential to the economic survival of the newsman because compulsory testimony disrupts the confidential relationships upon which his trade depends.<sup>132</sup> Economic hardship is not recognized, however, as a viable grounds for granting a privilege.<sup>133</sup> By stressing ethical considerations and economic loss before the common law courts, the news media has virtually invited the rejection of a journalist's privilege. It is suggested that the courts would respond favorably to a more compelling rationale.<sup>134</sup>

Even though no reported case has sustained the desired privilege,<sup>135</sup> the common law courts

have shown a marked solicitude for the plight of the reporter. This concern is demonstrated by several considerations. First, many common law courts have refused to compel a newsman to reveal his source when the identity was of doubtful relevance to the pending action.<sup>136</sup> Second, numerous cases dismissing contempt charges on technicalities illustrate a certain judicial reluctance to cite the newsman for contempt when this eventuality can be conveniently avoided.<sup>137</sup> Third, many of the lower courts have countenanced the newsman's refusal to testify without expressly recognizing a testimonial privilege.<sup>138</sup> Fourth, the common law concern for the press is manifest in the meager punishments meted out to obdurate reporters: contempt penalties are often limited to modest fines,<sup>139</sup> which will probably be paid by the newsman's employer,<sup>140</sup> and jail sentences have been minimal.<sup>141</sup> Finally, several unreported decisions<sup>142</sup> have granted the newsman's privilege.<sup>143</sup>

<sup>128</sup> See, e.g., *Parnell v. Walter*, 6 T.L.R. 138 (1890) (in action for libel where only issue was one of damages, plaintiff could not compel defendant to reveal the source). See also cases cited note 61 *supra*.

<sup>129</sup> Note, *The Right of a Newsman*, *supra* note 37, at 74. See, e.g., *People ex rel. Clarke v. Truesdell*, 79 N.Y.S.2d 413 (Sup. Ct. 1948) (reporters were released in habeas corpus proceedings when the order of commitment was found to be technically defective).

<sup>130</sup> See *Beecroft v. Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269, 270, 197 A.2d 416, 417 (1964); *Guest & Stanzler*, *supra* note 53, at 31 (in New York State, the privilege is recognized not by law but by tacit agreement); Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357, 359 (1935).

<sup>131</sup> *Guest & Stanzler*, *supra* note 53, at 47 n.145; Note, *The Journalist and His Confidential Source*, *supra* note 16, at 579. See, e.g., *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (1913), where the reporter was fined \$25.

<sup>140</sup> N.Y. Times, June 29, 1966, at 23, col. 1. The newsman's employer may be able to deduct the amount as a cost of doing business. Comment, *Government Investigations*, *supra* note 38, at 1201 n.11.

<sup>141</sup> Sentences have been as long as ten days. Comment, *Government Investigations*, *supra* note 38, at 1201 n.11. The jail is made as pleasant as possible for newsmen. EDITOR & PUBLISHER, Aug. 4, 1934, at 3 (reporters allowed to work their normal hours and spend off-duty hours in jail); *Guest & Stanzler*, *supra* note 53, at 47 n.145 (in the *Newburgh News* case, reporters were allowed to receive calls and presents—including a cake with a file protruding through the icing—and to write news stories from their cells).

<sup>142</sup> It should be noted that the great majority of cases on this subject are not reported. Note, *The Right of a Newsman*, *supra* note 37, at 61 n.3. The reason, perhaps, is that the government seldom appeals newsman's privilege cases. Cf. text accompanying note 270 *infra*. One commentary warns that unreported cases are taken from press news sources and, accordingly, should be used with caution. STAFF OF SENATE, *supra* note 112, at 55.

<sup>143</sup> Frank L. Toughill (unreported) EDITOR & PUB-

newsmen, see *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961).

<sup>128</sup> 269 N.Y. 291, 295, 199 N.E. 415, 416 (1935).

<sup>129</sup> Comment, *The Newsman's Privilege and the Constitution*, *supra* note 51, at 466.

Despite the plausibility of the argument that the newsman has a common law privilege to conceal his source of information, there seems to be little hope that a court would ever accept the argument. Cf. *Beaver*, *supra* note 3, at 246 n.7.

<sup>130</sup> W. ARTHUR & R. CROSSMAN, *THE LAW OF NEWSPAPERS* (2d ed. 1940).

<sup>131</sup> D'Alemberte, *supra* note 24, at 315. See, e.g., *In re Wayne*, 4 Hawaii Dist. Ct. 475 (1914). Cf. *Owens v. Frank*, 7 Wyo. 457, 53 P. 282 (1898) (no privilege for Free Masons who have taken a sacred oath of secrecy); *Duchess of Kingston's Case*, 20 How. St. Tr. 573 (1776) (early English "Point of Honour" doctrine abandoned). See generally, 35 N.Y.U.L. Rev. 1111 (1960) (notes that ethical arguments have ceased to be persuasive as a defense for not testifying).

<sup>132</sup> See, e.g., *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911).

<sup>133</sup> *Id.*; 8 J. WIGMORE, *EVIDENCE* § 2192 (McNaughton rev. 1961).

<sup>134</sup> See text accompanying notes 279-92 *infra*.

<sup>135</sup> *Guest & Stanzler*, *supra* note 53, at 18.

*The Newsman's Privilege as a Constitutional Guarantee*

Constitutionally, truth is not an end in itself.<sup>144</sup> The duty to testify is subject to mitigation, the most conspicuous illustration being the fifth amendment privilege against self-incrimination.<sup>145</sup> Indeed, from the standpoint of the law of evidence, the fifth amendment constitutes the primary obstruction to the efficient operation of the judicial system.<sup>146</sup>

In the 1915 case of *Burdick v. United States*,<sup>147</sup> a news editor refused to testify on the ground that disclosure of his source would tend to incriminate him. Further, Burdick refused to accept an executive pardon granted by President Wilson, arguing that acceptance constituted an implicit admission of guilt.<sup>148</sup> Writing for the District Court, Judge Learned Hand upheld Burdick's contempt citation, noting that it "would be preposterous to let him keep on suppressing the truth."<sup>149</sup> The Supreme Court, however, in a unanimous opinion by Mr. Justice McKenna, reversed the Hand decision and upheld Burdick's right to refuse the pardon. Technically, the *Burdick* decision turned on the distinction between immunity and pardon: A news reporter cannot refuse to testify where he

has been granted immunity.<sup>150</sup> Nonetheless, since it is "inconceivable" that Burdick was involved in committing the very crimes he had done more than any other man to expose,<sup>151</sup> the decision is notable as an early illustration of Supreme Court sympathy for the newsman's plight.<sup>152</sup>

The constitutional claim to a newsman's testimonial privilege urged in *Branzburg v. Hayes* is of comparatively recent origin. Until 1958<sup>153</sup> the proponents of a privilege for journalists emphasized the common law claim.<sup>154</sup> Moreover, even when a constitutional claim was asserted, it was premised on the fifth amendment rather than the first.<sup>155</sup>

In its contemporary form, the constitutional argument emphasizes the theory that a privilege protecting confidential news sources is necessary to assure the free flow of information guaranteed by the first amendment.<sup>156</sup> Initial judicial response to this argument was mixed. A majority of courts rejected the privilege,<sup>157</sup> although dicta in some decisions indicated that a right of nondisclosure might be appropriate in circumstances not presented.<sup>158</sup> A growing minority of courts, however, sustained the desired privilege,<sup>159</sup> and the resultant uncertainty necessitated the Supreme Court decision in *Branzburg v. Hayes*.<sup>160</sup>

Inasmuch as the "flow of information" theory had not been previously examined by the Supreme Court, the relevant precedents are to be found in general first amendment doctrine. Before re-

LISHER, Dec. 9, 1933, at 16 (privilege granted prior to adoption of Pennsylvania privilege statute); T. Norman Palmer (unreported) EDITOR & PUBLISHER, Aug. 24, 1935, at 6:

This court recognizes the right of a newspaperman to refrain from divulging sources of his information. If you feel that in doing this [taking the stand], it may interfere with this right you are at liberty not to take the stand at this time.

Nat Caldwell (unreported) N.Y. Times, June 1, 1948, at 25, col. 7; EDITOR & PUBLISHER, May 29, 1948, at 59; EDITOR & PUBLISHER, June 5, 1948, at 64. The opinion of the county court is set out in New York Law Revision Commission, Legis. Doc. 65 (A) 65 (1949), quoted in Note, *The Journalist and His Confidential Source*, *supra* note 16, at 576 n.42:

The press must get its information thru others, of necessity much is given in confidence, and I am unable to hold the witness in contempt of this matter. It's true it is hard to have serious charges made against public officials on hearsay evidence, but at times much good has been done in that way.

These cases give unmistakable effect to the defense of privilege in the absence of statute. Note, *The Right of a Newsman*, *supra* note 37, at 70-71 & n.63.

<sup>144</sup> Goldstein, *Newsman and Their Confidential Sources*, 162 THE NEW REPUBLIC 13, 14 (1970).

<sup>145</sup> *Id.*

<sup>146</sup> Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CINN. L. REV. 671 (1968).

<sup>147</sup> 236 U.S. 79 (1914).

<sup>148</sup> See Beaver, *supra* note 3, at 254.

<sup>149</sup> 211 F. 492, 494 (D.N.Y. 1913).

<sup>150</sup> *Brown v. Walker*, 161 U.S. 591 (1896); *Mills v. Louisiana*, 360 U.S. 230 (1959).

<sup>151</sup> CHAFEE, *supra* note 114, at 497.

<sup>152</sup> See N.Y. Times, Jan. 26, 1915, at 6, col. 3; cf. A. L. Sloan (unreported) EDITOR & PUBLISHER, Aug. 11, 1934, at 10 (contempt charges dropped when reported pleaded the fifth); CHAFEE, *supra* note 114, at 497 (judges quick to give reporter fifth amendment escape from contempt citation).

<sup>153</sup> The first case to assert the first amendment argument was *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

<sup>154</sup> Guest & Stanzler, *supra* note 53, at 18.

<sup>155</sup> The fifth amendment privilege is clearly distinguishable from a right asserted under the first amendment. *Barenblatt v. United States*, 360 U.S. 109 (1959).

<sup>156</sup> The argument was brought to national attention by the Guest & Stanzler article cited *supra* note 53.

<sup>157</sup> See, e.g., *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

<sup>158</sup> See cases cited at 408 U.S. 686.

<sup>159</sup> For a comprehensive listing of those cases finding a constitutional privilege, see Note, *Reporters and Their Sources*, *supra* note 38, at 318 n.7.

<sup>160</sup> Numerous legal commentators had called for a Supreme Court decision on whether a constitutional newsman's privilege exists. See, e.g., Beaver, *supra* note 3; Carter, *supra* note 131; Goldstein, *supra* note 144.

viewing these precedents, however, it is necessary to elaborate on the contemporary theory. Basically, the argument is as follows: (1) The first amendment protects the free flow of information to the public; (2) any restriction of the flow of information is inconsistent with first amendment guarantees; (3) compulsory testimony impairs confidence in reporters and dries up sources of information, and thereby restrains newsgathering and restricts the free flow of information to the public; (4) first amendment guarantees have a special constitutional status and cannot be restricted unless justified by a compelling governmental interest; (5) the state interest in compulsory testimony is not compelling in the case of the journalist; and (6) therefore, the Constitution guarantees a testimonial privilege for newsmen.

The first premise in the contemporary theory is that the first amendment protects the free flow of information to the public. A substantial body of evidence demonstrates that the first amendment was intended to reflect the early American belief that where the press is free, "everyone will live in the light."<sup>161</sup> Moreover, the Supreme Court has repeatedly emphasized that a free press is vital to an informed public.<sup>162</sup> As articulated by the Court in *Red Lion Broadcasting Co. v. FCC*:<sup>163</sup>

It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas which is crucial here. That right may not be constitutionally abridged. . . .

More specifically, the proponents of a newsman's privilege urge that the right to a confidential relationship should be derived from the right to gather information.<sup>164</sup> Prior to *Branzburg v. Hayes*, the question whether the process of newsgathering is within the ambit of the freedom of the press was a matter of considerable dispute. On the one hand, there is no indication in the writings of the times that the framers and backers of the Bill of Rights intended to include newsgathering among

the protections afforded to the press.<sup>165</sup> Dismissing the contrary suggestion as a "superstructure supported by assertion only,"<sup>166</sup> numerous courts concluded that the first amendment does not extend to the gathering of the news.<sup>167</sup> On the other hand, certain writers urged that newsgathering should be included among those protections reserved to the people by the tenth amendment.<sup>168</sup> Further, a growing number of legal commentators<sup>169</sup> expressed support for the thesis enunciated in Justice Musmanno's dissenting opinion in *In re Mack*: "Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of press becomes a river without water."<sup>170</sup> This argument garnered widespread judicial support<sup>171</sup> and was seemingly accepted in *Branzburg v. Hayes*. In the words of Mr. Justice White, "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>172</sup>

The second premise in the newsman's theory is that any restriction on the flow of information is inconsistent with first amendment guarantees. This premise is logically sound only if the first amendment protects every means of stimulating the flow of information to the public and the freedom of the press extends to every activity which assists in the gathering of the news. These propositions are of questionable validity. If the Constitution protected every means of increasing public awareness, virtually every statutory enactment would be subject to the first amendment compelling interest test<sup>173</sup> since the imposition of a penalty for violation of a statute *ipso facto* discourages violators from openly discussing their

<sup>165</sup> Guest & Stanzler, *supra* note 53, at 31.

<sup>166</sup> *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 884 (3rd Cir. 1958).

<sup>167</sup> See, e.g., *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954). Cf. *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967).

<sup>168</sup> See, e.g., W. DOUGLAS, *THE RIGHT OF THE PEOPLE* 81 (1958) Cf. M. KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* 192-93 (1957); F. THAYER, *LEGAL CONTROL OF THE PRESS* 178 (3rd ed. 1956).

<sup>169</sup> See Comment, *Government Investigations*, *supra* note 38, at 1225; Comment, 11 STAN. L. REV. 541, 543 (1959); Note, *Reporters and Their Sources*, *supra* note 38, at 328.

<sup>170</sup> 386 Pa. 251, 273, 126 A.2d 679, 689 (Musmanno, J., dissenting).

<sup>171</sup> See, e.g., *Associated Press v. Kvos, Inc.*, 80 F.2d 575 (19th Cir. 1935), *rev'd on juris. grounds*, 299 U.S. 269 (1936); *Brannan v. State*, 29 So. 2d 916 (Miss. 1947); *Lyles v. State*, 330 P.2d 734 (Okla. Crim. App. 1958).

<sup>172</sup> 408 U.S. at 681.

<sup>173</sup> See text accompanying notes 221-25 *infra*.

<sup>161</sup> WELLS, *THE OUTLINE OF HISTORY* 888 (1949).

<sup>162</sup> See, e.g., *Estes v. Texas*, 381 U.S. 532, 539 (1965); *New York Times v. Sullivan*, 376 U.S. 253, 270 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Indeed, it would be difficult to find a case where this idea is not expressed. Comment, *Government Investigations*, *supra* note 38, at 1234 n.197.

<sup>163</sup> 395 U.S. 367, 390 (1969).

<sup>164</sup> Comment, *The Newsman's Privilege and the Constitution*, *supra* note 51, at 449.

acts. If the freedom of the press encompassed all means of gathering the news, little or no protection could be afforded for the privacy of the individual.<sup>174</sup>

Not surprisingly, constitutional claims premised on the "free flow of information" theory have encountered increasing judicial resistance. In *Zemel v. Rusk*,<sup>175</sup> the Supreme Court sustained the Government's refusal to validate passports to Cuba even though the restriction rendered "less than wholly free the flow of information concerning that country."<sup>176</sup> In support of the decision, Mr. Chief Justice Warren observed that there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.<sup>177</sup> Similarly, the Supreme Court in *Kleindienst v. Mandel*<sup>178</sup> upheld the denial of a temporary nonimmigrant visa to a Belgian journalist and Marxist theoretician who had been invited to participate in academic conferences and discussions. Writing for the Court, Mr. Justice Blackmun dismissed the notion that denying the visa would restrict the spectrum of available knowledge by noting that not every such restriction is contrary to the Constitution.<sup>179</sup>

The same consideration is central to the majority decision in *Branzburg v. Hayes*. Thus, Justice White observed that:

Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of the news.<sup>180</sup>

<sup>174</sup> Legislation protecting privacy could be passed by the congress, of course, but such legislation would have to survive the compelling interest test applicable to first amendment freedoms. Cf. Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 232 (1971):

One cannot... resolve the press subpoena controversy by mindlessly looking to "progressive" legal thought because, as with the cases concerning the privacy tort and trial publicity, the "progressive" trends are on a collision course.

<sup>175</sup> 381 U.S. 1 (1965).

<sup>176</sup> *Id.* at 16.

<sup>177</sup> *Id.* at 17:

[T]he prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.

<sup>178</sup> 408 U.S. 753 (1972). Since *Kleindienst v. Mandel* was decided after *Branzburg v. Hayes*, it does not constitute a precedent for the *Branzburg* decision. The *Mandel* case is included, however, because it illustrates an emerging judicial attitude toward the "free flow of the news theory."

<sup>179</sup> 408 U.S. at 768.

<sup>180</sup> 408 U.S. at 691.

Admittedly, the proponents of the "free flow of the news theory" have not contended that the results depicted by Justice White should be countenanced. It might be suggested, therefore, that the theory is valid insofar as it provides limited protection for news sources and invalid only when pushed to an extreme. The classic rebuttal is contained in John Stewart Mill's essay *On Liberty*:

Strange it is, that men should admit the validity of the arguments..., but object to their being "pushed to an extreme;" not seeing that unless the reasons are good for an extreme case, they are not good for any case.<sup>181</sup>

Not all restrictions on the flow of information to the public are contrary to the first amendment. Accordingly, the mere demonstration of a restriction on the flow of the news does not establish the existence of a first amendment interest. This fact constitutes the fatal flaw in an otherwise persuasive chain of reasoning.

The third link in the newsman's theory is that compulsory testimony burdens the free flow of information to the public. The asserted burden has three dimensions. First, the denial of a privilege reduces the willingness of informants to seek out and communicate with newsmen.<sup>182</sup> Second, the fear of forced disclosure compels the reporter to avoid controversy and hardship by tempering his reporting to reduce the possibility that he will be required to submit to interrogation.<sup>183</sup> Finally, the press is encouraged to destroy all documents which might be demanded under compulsion of subpoena duces tecum.<sup>184</sup>

The magnitude of the asserted burden on the flow of the news is a matter of considerable controversy. Opponents of the privilege contend that any interference is less than de minimis<sup>185</sup> and

<sup>181</sup> J. MILL, ON LIBERTY 39 (1859).

<sup>182</sup> Guest & Stanzler, *supra* note 53, at 44. See generally Goldstein, *supra* note 144, *passim*.

<sup>183</sup> Comment, *Government Investigations*, *supra* note 38, at 1208 n.43; *Imprisoned Press*, *supra* note 44:

The extension of that principle [forced testimony] could make the press a prime instrument in muzzling itself and forfeiting its power of independent inquiry.

<sup>184</sup> It has become common for newspapers and television stations to destroy all their unpublished film in order to avoid having it available for production under compulsion of subpoenas duces tecum. Comment, *Government Investigations*, *supra* note 38, at 1208 n.44; Caldwell, *supra* note 44:

I ripped up the notebooks, I erased the tapes and shredded almost every document that I had that dealt with the Panthers. Many of those items should have been saved, for history's sake, as much as for anything.

<sup>185</sup> Comment, *Compulsory Disclosure of a Newsmen's Source*, *supra* note 37, at 247.

cite the following arguments in support of this contention: (1) Inasmuch as the informant is usually ignorant of any privilege for journalists, denial of the privilege is not likely to inhibit confidential sources;<sup>186</sup> (2) the information acquired by newspapers by way of confidential communications is but a minor source of the great fountain of news available to newspapers;<sup>187</sup> and (3) even where confidential news sources are deterred, the desired information can usually be obtained by other means.<sup>188</sup> The proponents of a newsman's privilege have countered that if the rule of forced disclosure is continued, the "entire stream of information will become shallow and polluted."<sup>189</sup> In support of this assertion, they argue that: (1) The assurance of confidential treatment is essential to the acquisition of news sources,<sup>190</sup> and in specific instances the fear of forced disclosure has silenced previously cooperative informants;<sup>191</sup> (2) vast numbers of vital news stories are based on information received in confidence;<sup>192</sup> and (3) without confidential sources, the news would be little more than a compendium of official propaganda and press releases.<sup>193</sup>

Given the difficulties inherent in obtaining reliable data,<sup>194</sup> various writers have tried to dem-

<sup>186</sup> Beaver, *supra* note 3, at 252.

<sup>187</sup> *Id.*; Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357, 360 (1935).

<sup>188</sup> Beaver, *supra* note 3, at 251 n.37; Note, *Privilege of Newspapermen*, *supra* note 187.

<sup>189</sup> House Subcommittee Concludes, *supra* note 36.

<sup>190</sup> Comment, *Confidentiality of News Sources*, *supra* note 14, at 1090 n.1281; Frankel, *Mitchell and Press Problems*, N.Y. Times, Feb. 6, 1970, at 40, col. 4. The most persuasive articulation of this argument is that presented by Prof. R. E. Lance of Yale:

I am convinced that substantial doubt among respondents about the confidential treatment of the material offered in scholarly interviews, would in the past have specifically reduced our knowledge of communism in Southern Italy, the politics of Ghana the military in Brazil, the perception of the Arab cause in Lebanon, the attitudes toward war among leaders of four major European powers, the attitudes toward law held by convicted criminals in our prisons, the operation of the Mayor's office in New Haven, and much more.

Cited in Donner & Cerruti, *supra* note 34, at 19.

<sup>191</sup> See, e.g., Comment, *The Newsman's Privilege and the Constitution*, *supra* note 51, at 458.

<sup>192</sup> See, e.g., H. SHERWOOD, *THE JOURNALISTIC INTERVIEW* 89 (1969); A. KROCK, *MEMOIRS: SIXTY YEARS ON THE FIRING LINE* 181, 184-85 (1968); H. KURFELD, *BEHIND THE LINES: THE WORLD OF DREW PEARSON* 50, 142 (1968).

<sup>193</sup> Desmond, *supra* note 35, at 8.

<sup>194</sup> Only two statistical studies have been made. Guest & Stanzler, *supra* note 53; Blasi, *supra* note 174. For the most part, these studies consist of an analytical compilation of the opinions of various representatives of the news media. Their value is impaired by three

onstrate the magnitude of the burden on the flow of the news by indirect methods of proof. Opponents of the privilege have thus lauded the superiority of the news reporting found in the New York Times even though the State of New York does not have a confidence statute for journalists.<sup>195</sup> However, such an argument ignores the possibility of even greater journalistic excellence were the privilege granted.<sup>196</sup> Opponents of the privilege have also emphasized the paucity of newsman's privilege cases; the number of cases in which the newsman's knowledge might be relevant is assertedly so small in relation to the frequency with which information is confidentially communicated to a reporter that the danger of compulsory disclosure is negligible.<sup>197</sup> Whether or not there is a paucity of cases, however, the implications of such a fact are highly ambiguous. It may indicate that newsmen are rarely called upon to divulge confidential sources, that confidential information is rarely relevant to judicial proceedings, or that newsmen seldom appeal contempt citations.<sup>198</sup>

Both opponents and proponents of the newsman's privilege have attempted to justify their stance by the fact that, historically, newsmen have almost always refused to divulge the names of their informants even under the threat of fine and incarceration.<sup>199</sup> Two competing implications can be drawn, however, from the willingness of newsmen to go to jail to protect their sources. On the one hand, it has been suggested that journalistic obstinacy supplants the need for constitutional or statutory protection.<sup>200</sup> On the other hand, one commentator has urged that it is time to reconsider the rationale of a law "which evokes a widespread spirit of civil disobedience among journalists."<sup>201</sup> Moreover, if newsmen were not

factors. First, the individual reporter may not be capable of ascertaining the precise degree of chilling of confidential relationships which is likely to ensue should he be forced to testify. Second, the studies lack the objectivity requisite to reliability since the persons interviewed have a vested interest in the results. Finally, newsmen often disagree over the proportion of articles originating from confidential tips. Cf. 408 U.S. at 694.

<sup>195</sup> See Semeta, *supra* note 67, at 320.

<sup>196</sup> Guest & Stanzler, *supra* note 53, at 43.

<sup>197</sup> See Gallup, *supra* note 114, at 21.

<sup>198</sup> Guest & Stanzler, *supra* note 53, at 44 n.134.

<sup>199</sup> Only two cases have resulted in the newsman's identification of his source after his citation for contempt. *In re Wayne*, 4 Hawaii Dist. Ct. 475 (1914); *Eddie Barr* (unreported) N.Y. Times, Mar. 13, 1931, at 25, col. 8. But see Comment, *Government Investigations*, *supra* note 38, at 1203 (suggesting that the recent rash of subpoenas has led several newsmen to comply).

<sup>200</sup> See, e.g., Note, 61 MICH. L. REV. 184, 189 (1962).

<sup>201</sup> D'Alembre, *supra* note 24, at 307.

willing to face incarceration in such circumstances, it is possible that sources of information would dry up and that the free flow of the news would be measurably impaired.<sup>202</sup>

In the absence of reliable data, and given the deficiencies of the indirect proofs just discussed, the majority in *Branzburg* asserts that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen."<sup>203</sup> Rejecting this assertion, Justice Stewart contends that because of the Court's historic presumption in favor of first amendment values, "[w]e cannot await an unequivocal—and therefore unattainable—impairment from empirical studies."<sup>204</sup> The conflict in views is explained by the fact that the two opinions are addressing different issues. The majority is ascertaining whether a first amendment interest exists. Stewart, however, presupposes the existence of a first amendment freedom and addresses the question of the standard to be applied in determining whether or not governmental activity is unconstitutionally restraining this freedom.

Some proponents of a newsman's privilege have urged that, whatever the present impact of forced testimony, the crucial consideration is that if the power to compel testimony were used to the full extent permissible there would be a serious burden on the free flow of the news.<sup>205</sup> The underlying rationale for this contention is that abuse of a power is not necessary to attack its constitutionality.<sup>206</sup> As Justice Douglas urged in his dissent in *Poe v. Ullman*,<sup>207</sup> the tacit agreement by prosecutors not to assert the power does not justify the existence of a power which, if asserted, would be unconstitutional.

The application of this doctrine is best perceived through an examination of the controversy surrounding the recently-issued Attorney General guidelines.<sup>208</sup> Designed to prevent a confrontation

which could seriously affect press relationships with the federal government, the bar and the courts,<sup>209</sup> the guidelines have reversed the prior trend toward increased prosecutorial reliance on the press.<sup>210</sup> The Justice Department maintains that a newsman's privilege is not necessary because of the protections thus afforded,<sup>211</sup> and, in part at least, this contention is given favorable recognition by the majority in *Branzburg*.<sup>212</sup> The adequacy of the guidelines in preventing abuse of prosecutorial power, however, has been seriously questioned. First, it is suggested that loopholes in the guidelines render any meaningful protection illusory; the guidelines give little indication of the factors which are to be weighted in determining whether to subpoena a reporter.<sup>213</sup> More important, the guidelines are specifically discardable if "emergencies and other unusual situations" should de-

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utilizing the press as a springboard for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

C. The Government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

D. Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, whenever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

*Guidelines of the Attorney General on Press Subpoenas*, 39 U.S.L.W. 2111 (Aug. 25, 1970).

<sup>209</sup> Former Attorney General Mitchell quoted in N.Y. Times, Aug. 11, 1970, at 24, col. 2.

<sup>210</sup> See sources cited at note 38 *supra*.

<sup>211</sup> *House Subcommittee Concludes*, *supra* note 36, at 2081.

<sup>212</sup> 408 U.S. at 707 n.41.

<sup>213</sup> Note, *Reporters and Their Sources*, *supra* note 38, at 341 n.108.

<sup>202</sup> Guest & Stanzler, *supra* note 53, at 47.

<sup>203</sup> 408 U.S. at 693.

<sup>204</sup> *Id.* at 736.

<sup>205</sup> See, e.g., Guest & Stanzler, *supra* note 53.

<sup>206</sup> *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (concurring opinion); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), and cases cited therein.

<sup>207</sup> 367 U.S. 497, 512 (1961) (Douglas, J., dissenting).

<sup>208</sup> In requesting the Attorney General's authorization for a subpoena, the following principles are to apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of



velop.<sup>214</sup> Second, the negotiations implicit in the guidelines involve a bargaining process in which the weak will be pressured into divulging information while the media giants will not.<sup>215</sup> Finally, since administrative guidelines may be changed by the stroke of a pen,<sup>216</sup> a vital aspect of freedom of the press is dependent upon the "political machinations within the Justice Department."<sup>217</sup>

The primary weakness of the "potential abuse" argument is that a newsman's privilege is also susceptible to illegitimate use. Limited only by the dubious restraint of his own zeal,<sup>218</sup> the reporter who is immune from judicial subpoena may indulge in muckraking, the dissemination of untruthful scandal, and "circulation-seeking sensationalism."<sup>219</sup> The fear that the privilege will be abused by the press is exacerbated by the fact that the logic of the free flow of the news argument dictates the granting of an absolute privilege. Thus, in the principal case, reporter Caldwell urged that his mere appearance before the grand jury would jeopardize his news relationships. Other proponents of a newsman's privilege have asserted that if the privilege can be defeated for any reason, it will not alleviate the chilling effect on the flow of information.<sup>220</sup>

The fourth link in the contemporary theory supporting the privilege is that first amendment guarantees have a special constitutional status and cannot be restricted unless justified by a compelling governmental interest. The validity of this premise is not open to doubt. Although literally

<sup>214</sup> Comment, *Government Investigations*, *supra* note 38, at 1249-50.

<sup>215</sup> Goldstein, *supra* note 144, at 13.

<sup>216</sup> *Newsman's Privilege Legislation Called Essential*, *supra* note 35, *passim*.

<sup>217</sup> *Id.* at 2103.

<sup>218</sup> Cf. Semeta, *supra* note 67, at 317. But see J. MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), in 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 571 (2d rev. ed. 1901):

[S]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.

Cf. Barnhart, *supra* note 112, at 378 (dictates of sound public policy survive even their abuse).

<sup>219</sup> Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388 (1906) (a privilege, if not an abuse in its inception, is proverbially sure to become one); Note, 5 BROOKLYN L. REV. 215, 216 (1936) (privilege could operate as a cloak for circulation-seeking sensationalism); Note, 34 MICH. L. REV. 729, 731 (1936) (immunity would aid the expansion of muckraking); Note, 45 YALE L.J. 357 (1935) (privilege would open the way to reckless publication). But see Guest & Stanzler, *supra* note 53, at 41 (fear that privilege would shield newspapers from libel actions a misconception).

<sup>220</sup> See Comment, *Government Investigations*, *supra* Note 38, at 1236.

the first amendment restrains legislative rather than judicial acts, the Supreme Court has rejected this distinction.<sup>221</sup> Similarly, although first amendment freedoms are not absolute,<sup>222</sup> the Supreme Court has consistently held that only a compelling state interest can justify their restriction.<sup>223</sup> Indeed, a restraint on the press need not be direct to be an abridgement under the Constitution,<sup>224</sup> and the mere prospect of self-censorship of first amendment activity is often sufficient to justify holding the state activity unconstitutional.<sup>225</sup>

The final link in the contemporary "flow of information" theory is that the state interest in compulsory testimony is not compelling in the case of the journalist. The Government has justified press subpoenas by pointing to the dangerous activities of which newsmen may have knowledge.<sup>226</sup> Unfortunately, this general characterization promotes a blanket assertion of society's right to testimony without looking behind the assertion in an individual case to determine whether society's interests in the due administration of justice are actually promoted by enforcement of the principle.<sup>227</sup>

Before examining the question of whether or not compelling a reporter to testify furthers the due administration of justice, a distinction between the two functions of the grand jury must be drawn. As described in *Hale v. Henkel*,<sup>228</sup> the grand jury stands between the prosecutor and the accused and investigates the possible commission of crimes. Although compulsory disclosure is important in either case,<sup>229</sup> the two functions should not be accorded the same constitutional status. As noted in *Wood v. Georgia*,<sup>230</sup> the primary purpose

<sup>221</sup> See, e.g., *Blair v. United States*, 250 U.S. 273 (1919); Note, 61 MICH. L. REV. 184, 188 n.18 (1962).

<sup>222</sup> See *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>223</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>224</sup> See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

<sup>225</sup> See *Freedman v. Maryland*, 380 U.S. 51, 56 (1965); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

<sup>226</sup> See Statement of Attorney General Mitchell, N.Y. Times, Feb. 6, 1970, at 40, col. 4.

<sup>227</sup> Guest & Stanzler, *supra* note 53, at 37.

<sup>228</sup> 201 U.S. 43, 59 (1906).

<sup>229</sup> Note, *Reporters and Their Source*, *supra* note 38, at 319, n.11.

<sup>230</sup> 370 U.S. 375, 390 (1962).

of the grand jury has historically been the protection of the innocent against "hasty, malicious, and oppressive persecution." In this respect, the right to a grand jury proceeding is a basic fifth amendment guarantee.<sup>231</sup> It strains credulity, however, to suggest that the second function of the grand jury, that of investigating crimes, is also protected by the Bill of Rights. The fifth amendment is normally viewed as a limitation on the power of the Federal Government, not as a reinforcement of the prosecutorial powers already inhering in the executive.<sup>232</sup> While it can hardly be doubted that a reporter should be compelled to testify where essential to a defendant's case,<sup>233</sup> the state interest in the grand jury as an instrument of investigation is not necessarily equally compelling.<sup>234</sup>

Where the grand jury is investigating the possible commission of a crime, the press subpoena is not essential to the due administration of justice. First, newsmen often comply with the request for information, even without a subpoena.<sup>235</sup> Second, the executive branch usually has other sources of information and rarely finds it necessary to turn to the press.<sup>236</sup> Third, surveys of the states which have enacted newsman privilege statutes indicate that there is no discernable adverse impact on the quality of law enforcement.<sup>237</sup> Fourth, if forced testimony severs a newsman's confidential relationships, denying the privilege will prove self-defeating and counterproductive.<sup>238</sup> In the words of a noted reporter:<sup>239</sup>

Once it is established and believed that news correspondents are to be utilized in grand jury investi-

gation, they will be of precious little value to such investigations because they will no longer have access to information that grand juries might want.

Finally, a policy of forced testimony hinders the journalist's ability to foster the due administration of justice via public pressure. The reporter is a governmental gadfly, uncovering waste and corruption in public office, and improving the administration of justice through the antiseptic power of exposure.<sup>240</sup>

In short, the newsman's theory for a constitutional privilege based on an alleged burdening of the free flow on the news is in large part persuasive. The freedom of the press properly extends to news gathering, compulsory testimony has an uncertain but important impact on the ability of reporters to gather the news, the first amendment requires that the freedoms guaranteed therein should not be infringed except by compelling state interests, and the state interest in compelling journalist's testimony is far from compelling where the grand jury is performing an investigatory function. The theory breaks down, however, when it is suggested that any restriction on the flow of the news is *ipso facto* unconstitutional. Since this premise is essential to the theory, the Supreme Court properly rejected the newsman's claim in *Branzburg v. Hayes*.

### III. AN ALTERNATIVE THEORY IN SUPPORT OF A NEWSMAN'S PRIVILEGE

Good newspapermen don't want the privilege; bad newspapermen shouldn't get it.<sup>241</sup>

As heretofore presented to the courts, the newsman's privilege would vest in the reporter. Under the "free flow of information theory" the source was constitutionally irrelevant,<sup>242</sup> and at common law, the requested privilege was usually discretionary with the reporter.<sup>243</sup> This approach should be modified for two reasons. First, vesting the privilege in the reporter is contrary to the concept of a free press embodied in the constitution. Second, vesting the privilege in the source

<sup>231</sup> Cf. 408 U.S. at 687.

<sup>232</sup> Donner & Cerruti, *supra* note 34, *passim*.

<sup>233</sup> See text accompanying note 69 *supra*.

<sup>234</sup> Cf. Guest & Stanzler, *supra* note 53, at 50: "If the name of the source is sought for a criminal trial it should make a difference whether the party seeking the name is the prosecutor or the defendant."

<sup>235</sup> Veenker, *Chronicle the Cops*, THE CHICAGO GUIDE, Dec., 1972, at 65, 69; Comment, *Government Investigations*, *supra* note 38, at 1201.

<sup>236</sup> Comment, *Government Investigations*, *supra* note 38, at 1239 n.217; Desmond, *supra* note 35, at 8: "[S]urely the law enforcement officials, aided by staffs of trained technicians and armed with the latest weapons of science are in a better position to find a criminal than is a reporter whose only equipment is a 'nose for news.'"

<sup>237</sup> Guest & Stanzler, *supra* note 53, at 38.

<sup>238</sup> Comment, *Government Investigations*, *supra* note 38, at 1240: "[A]ny expectation of long range benefits to the administration of justice stemming from subpoenas to the professional press is almost entirely illusory."

<sup>239</sup> Walter Cronkite, quoted in Comment, *Confidentiality of News Sources*, *supra* note 14, at 1083 n.1247.

<sup>240</sup> See, e.g., Desmond, *supra* note 35, at 9-10:

[I]n our complex society, government has become so vast, so intricate, so remote in its internal administration, that our average citizen has neither the time nor experience to check on his public officials, and must usually rely on a free press for an audit of official activities.

<sup>241</sup> Example of a less sophisticated argument in the newsman's privilege debate, cited *id.* at 7.

<sup>242</sup> See note 293 *infra*.

<sup>243</sup> See note 283 *infra*.

substantially strengthens the newsman's arguments for both a constitutional and a common law privilege.

Historically, the concept of a free press has implied an unprivileged press.<sup>244</sup> As Lord Russell proclaimed in 1900, "The liberty of the press is no greater and no less than the liberty of every subject of the Queen."<sup>245</sup> This principle is implicit in the Supreme Court decisions extending the protections afforded by the first amendment to those who distribute handbills in the street.<sup>246</sup> The man who publishes only a single pamphlet on his favorite cause should have the same rights as an established newsman since the freedom of the press is no more the prerogative of the editor or publisher than freedom of speech is the exclusive right of the owner of an assembly hall.<sup>247</sup>

The FCC has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. In upholding the "fairness doctrine," the Supreme Court in *Red Lion Broadcasting v. FCC*<sup>248</sup> ruled that neither the government nor the broadcasters themselves could constitutionally bar non-licensees from access to the air waves for expression of their views. In *Associated Press v. United States*,<sup>249</sup> the Supreme Court upheld the constitutionality of antitrust legislation as applied to the press:

Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

As both *Red Lion Broadcasting* and *Associated Press* reveal, the interests of the press as an established institution do not always coincide with the interests of the press as a popular freedom.

It is crucial, therefore, to note that the granting of a privilege for newsmen, as urged by the petitioners in *Branzburg v. Hayes*, would strengthen the established press at the expense of the lone

pamphleteer. This conclusion is implicit in the premise that a testimonial privilege cannot extend to everyone without rendering the judicial system impotent.<sup>250</sup> Since everyone has an equal right to gather the news,<sup>251</sup> if an established journalist can refuse to reveal the identity of an informant, then every witness called to the stand might equally refuse to testify on the ground that the testimonial compulsion violates his first amendment rights.<sup>252</sup> Thus, it is difficult to deny that the proposed privilege should extend to researchers, novelists and other authors who may rely on confidential communications and who contribute to a vigorous exchange of opinion and information.<sup>253</sup> The privilege should also extend to underground newspapers and student journalists.<sup>254</sup> In fact, any attempt to define the limits to such a privilege breaks down because everyone is arguably within the defined limits.<sup>255</sup>

An examination of the various state privilege statutes reinforces the preceding conclusion. Each of the statutes limits the privilege to the established media,<sup>256</sup> usually by modifying the term "newspaper" with the phrase "paid general circulation."<sup>257</sup> Three dangers inhere in such a classification. First, the source who chooses to express himself through a publication which does not receive

<sup>250</sup> Cf. Comment, *Confidentiality of News Sources*, *supra* note 14, at 1096 n.1318; text accompanying notes 101-11 *supra*.

<sup>251</sup> See text accompanying note 249 *supra*; cf. sources cited at note 247 *supra*.

<sup>252</sup> Beaver, *supra* note 3, at 250.

<sup>253</sup> House Subcommittee Concludes, *supra* note 36, at 2082 (quoting Asst Attorney General Roger C. Crampton):

The pending bills define the category of persons who would be entitled to claim the privilege largely in terms that would be applicable to the employees of large, commercial newsgathering organizations such as newspapers, broadcast networks, and magazines. While this has the virtue of delimiting the group entitled to claim the privilege, and thereby simplifying its administration, we find troublesome the exclusion of other individuals—such as academic researchers, novelists, lecturers and dramatists—who may rely on confidential sources of information and who contribute to a vigorous exchange of opinion and information.

Cf. *Newsman's Privilege Legislation Called Essential*, *supra* note 35, at 2101 (lobbying activities by the Author's League).

<sup>254</sup> *Id.* at 2102; cf. *State v. Lender*, 266 Minn. 561, 124 N.W.2d 355 (1963) (no privilege for recent law school graduate not yet admitted to the bar). But see Beaver, *supra* note 3, at 255 (highly unlikely that privilege would extend to student journalists).

<sup>255</sup> Beaver, *supra* note 3, at 258.

<sup>256</sup> See D'Alemberte, *supra* note 24 for a comprehensive and outstanding survey and critique of the various state newsman's privilege statutes.

<sup>257</sup> *Id.*

<sup>244</sup> Cf. Semeta, *supra* note 67, at 311.

<sup>245</sup> R. v. Gray, 2 Q.B. 36, 40 (1900).

<sup>246</sup> See *Jamison v. Texas*, 318 U.S. 413 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

<sup>247</sup> F. THAYER, *LEGAL CONTROL OF THE PRESS* 168 (4th ed. 1962); D'Alemberte, *supra* note 24, at 336; cf. *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968); Note, 82 HARV. L. REV. 1384, 1391 (1969).

<sup>248</sup> 395 U.S. 367 (1969).

<sup>249</sup> 326 U.S. 1, 20 (1945).

a paid general circulation is necessarily penalized.<sup>253</sup> Second, if the government has the power to allow a privilege to a special class of news gatherers, it *ipso facto* has the power to limit that class.<sup>259</sup> Finally, if the privilege is essential to newsgathering, only those with the privilege will be able to effectively gather the news. Accordingly, the newsman's privilege would "extinguish the traditional concept that the press and journalists should not be singled out for special legal favors,"<sup>260</sup> and the first amendment would become the private preserve of the favored few.

The newsman has attempted to justify the asserted privilege by emphasizing that he is not seeking a narrow, selfish privilege. Rather, he is seeking to vindicate the larger public right to know.<sup>261</sup> This contention confuses the real issue. Even if the newsman is extolling the public right to know, he is also asserting the right to serve as the special representative of the public interest.

The repugnancy of a special privilege is heightened by the fact that such a privilege would exacerbate the current trend toward the economic concentration of the means of publication. One commentator notes that by the turn of the century, the American press became completely transformed and re-created.<sup>262</sup> The concentration of the instruments of publication has been an inevitable concomitant of an astronomical rise in publishing costs.<sup>263</sup> In the seven years between 1960 and 1967, the number of chain-owned daily newspapers increased by 56 percent; chains currently control 49.3 percent of the dailies in the country representing 61.8 percent of total circulation; and, at the present rate of expansion, all daily newspapers will be owned by chains in less than twenty

years.<sup>264</sup> A probable consequence of this concentration of power and money is the control of centers for the diffusion of ideas, and ultimately, for opinion manipulation.<sup>265</sup> As the capacity for organized control of newspaper opinion by advertisers is increased, public affairs journalism becomes bracketed by advertising pressure.<sup>266</sup> There are thus serious potential dangers in any policy which enhances the privileged character of the established press.

The economic might of the news media is complemented by political power. When the press speaks with one voice, its "persuasive power upon politically sensitive legislators is understandably very strong."<sup>267</sup> Accordingly, there is little doubt that media agitation has led to the attractiveness of "freedom of information" as a political issue.<sup>268</sup> Moreover, the press has utilized the machinery of government to effectuate the changes necessary to preserve its vital interests.<sup>269</sup> The power of the established press extends to the arena of press subpoenas. Since the reporter who is cited for contempt can count on immense support from newspapers all over the country, the executive branch is often deterred from abusing the subpoena power. The District Attorney in the Newburgh News case, for example, was vilified in the press and soundly

<sup>264</sup> *Id.*; cf. Bishop, *The Profits of Fusion*, 214 NATION 590 (1972).

<sup>265</sup> Semeta, *supra* note 67, at 320.

<sup>266</sup> Souter, *Chicago Media: Turning On or Tuning Out?*, THE CHICAGO GUIDE, Dec., 1972, at 57 (quoting the executive editor of Chicago Today: "[F]rankly, some [scandals] would be suicide to do considering political and advertising pressure. It's better to fight another battle at another time." Cf. White, *How Free is Our Press?*, 146 NATION 693-95 (1938):

The advertising agencies undertake to protect their clients from what the clients and agents may regard as real danger from inimical social, political, or industrial influences. As advisers the advertising agencies may exercise unbelievably powerful pressure upon newspapers. There is grave danger that in the coming decade, as social, industrial, and economic problems become more and more acute, this capacity for organized control of newspaper opinion by the political advisers of national advertisers may constitute a major threat to a free press.

<sup>267</sup> Beaver, *supra* note 3, at 256 n.54.

<sup>268</sup> Blanchard, *Present at the Creation: The Media and the Moss Committee*, 49 JOURNALISM Q. 271, 274 n.23 (1972); cf. Stone, *Review of Pound, Jurisprudence*, 75 HARV. L. REV. 1240, 1248 (1962).

<sup>269</sup> See D. CATER, *THE FOURTH BRANCH OF GOVERNMENT* (1959); B. COHEN, *THE PRESS AND FOREIGN POLICY* (1963); D. NIMMO, *NEWSGATHERING IN WASHINGTON* (1964); F. SIEBER, T. PETERSON & W. SCHRAMM, *FOUR THEORIES OF THE PRESS* (1956); Hachten, *The Press as Reporter and Critic of Government*, 40 JOURNALISM Q. 12 (1963).

<sup>253</sup> Note, HARV. L. REV., *supra* note 247.

<sup>259</sup> D'Alemberte, *supra* note 24, at 320.

<sup>260</sup> Semeta, *supra* note 67, at 313.

<sup>261</sup> Comment, *Confidentiality of News Sources*, *supra* note 14, at 1084 n.1250:

The privilege sought by the news media is not necessarily for the benefit of the newsman, nor of the informer, though exercise of the privilege would have that consequence. The primary purpose of the privilege is to maintain a steady flow of information and though from individuals through the news media to the public.

But see N.Y. LAW REVISION COMM'N REP. 37 (1949) (the real desire for the privilege is not a zeal for the public good but desire for prestige).

<sup>262</sup> Semeta, *supra* note 67, at 312.

<sup>263</sup> In 1835, when James Gordon Bennett launched the New York Herald with \$500, anybody could start a newspaper. Today, it would take perhaps \$10 million to establish a major daily. Paneth, *Newspapers in Chains*, 214 NATION 588, 589 (1972).

thrashed in the primary in his bid for re-election.<sup>270</sup> More recently, media dramatization of the plight of various latter-day Zengers precipitated the Attorney General guidelines.<sup>271</sup> In short, there is considerable justification for Justice Powell's observation in *Branzburg v. Hayes* that it is difficult to seriously believe that "the media—properly free and untrammelled in the fullest sense of these terms—[is] not able to protect" itself.<sup>272</sup>

Without a special privilege, the established press has a vested interest in ferreting out abuse of the grand jury subpoena power. It has been suggested that the grand jury is currently being used to curb political dissent, to harass and intimidate the radical left, and to take anti-war intellectuals to the woodshed.<sup>273</sup> The problem of press subpoenas, therefore, is but a "special instance of a much larger problem which has not yet received the attention it deserves."<sup>274</sup> The granting of a special privilege to the media giants would remove the vital interest the press currently has in exposing such abuse and thereby precipitating reform. Consequently, the privilege would protect only those least in need of protection.

The advocates of a newsman's privilege have drawn a false dichotomy between first amendment freedoms and the public interest in the due administration of justice. As heretofore presented to the courts, the privilege is inconsistent with both the duty to testify and the first amendment guarantee of an unfavored press. This inconsistency is emphasized throughout the majority opinion in *Branzburg v. Hayes*.<sup>275</sup>

It is difficult to ascertain why the proponents of a privilege for journalists have consistently urged that such a privilege should inure in the reporter. Since he rarely discloses his source in any event,<sup>276</sup> the reporter should have no serious objection to vesting the privilege in the source of confidential communications.<sup>277</sup> Moreover, since

the courts have not addressed the issue of a privilege vested in the source,<sup>278</sup> such a privilege constitutes an untested avenue for expanding the protections now afforded to the reporter-source relationship.

### *The Source's Privilege as a Common Law Right*

In rejecting the newsman's privilege, the common law courts have emphasized its anomalous features. The doctrinal barriers to a common law privilege can be hurdled, however, by stressing the rights of the source. The first such barrier is that the newsman has asserted the right to conceal the identity of his source and nothing more.<sup>279</sup> In the usual privilege, protection is provided for the confidential communications, while the identity of the source is known.<sup>280</sup> This barrier can be overcome by claiming a privilege for the information the newsman receives in confidence. Indeed, newsmen have increasingly attempted to broaden the perspective of the proposed privilege to protect more than the identity of the source,<sup>281</sup> and the common law already recognizes the right to protect the identity of a source when incident to the proper protection of confidential communications.<sup>282</sup>

The second barrier to common law protection for the reporter-source relationship is that heretofore the privilege has been vested in the newsman who retains sole discretion as to whether or not the confidence of his source will be respected.<sup>283</sup> In the typical testimonial privilege, the privilege is that of the impartor of the confidence, not that of the recipient.<sup>284</sup> This barrier is removed from consideration if the privilege is vested in the source of confidential news.

Finally, the traditional privilege nurtures a socially desirable relationship. Thus the privilege

<sup>278</sup> See notes 283 & 293 *infra*.

<sup>279</sup> "[T]he issue in the past has been the duty of the newsman to reveal the source of his information." Comment, *Government Investigations*, *supra* note 38, at 1198.

<sup>280</sup> Comment, *The Newsman's Privilege and the Constitution*, *supra* note 51, at 447.

<sup>281</sup> Cf. *id.* at 438 n.7.

<sup>282</sup> See, e.g., *Ex parte McDonough*, 170 Cal. 230, 149 P. 566 (1915).

<sup>283</sup> See, e.g., Gallup, *Further Consideration of a Privilege for Newsmen*, 14 ALBANY L. REV. 16, 17 (1950); Note, CORNELL L.Q., *supra* note 67, at 118.

<sup>284</sup> The attorney-client privilege belongs to the client; the physician-patient privilege inures in the patient; and the priest-penitent privilege is bestowed upon the reformed sinner. See Note, *Privileged Communications—Some Recent Developments*, *supra* Note 125, at 596, and cases and materials cited therein.

<sup>270</sup> *People ex rel. Clarke v. Truesdell*, 79 N.Y.S.2d 413 (Sup. Ct. 1948). See Guest & Stanzler, *supra* note 53, at 48 n.148.

<sup>271</sup> Goldstein, *supra* note 144, at 13.

<sup>272</sup> 408 U.S. at 709 (concurring opinion).

<sup>273</sup> Donner & Cerruti, *supra* note 34, *passim*.

<sup>274</sup> Goldstein, *supra* note 144, at 15.

<sup>275</sup> See, e.g., 408 U.S. at 682.

<sup>276</sup> See note 199 *supra*.

<sup>277</sup> But see Guest & Stanzler, *supra* note 53, at 45: "Newsmen need some flexibility to be able to use confidential sources at all." It is difficult to take this argument seriously. Even the authors note that newsmen exercising their discretion guard their sources just as tightly as if they were forbidden by law to disclose. *Id.*

for confidential marital communication is sacrosanct because of the notion that secrecy will promote marital harmony;<sup>285</sup> the doctor-patient privilege is justified as an incentive to obtain proper medical care;<sup>286</sup> and the attorney-client privilege is viewed as essential to the frank communications requisite to an effective defense.<sup>287</sup> The relationship which would be protected by a newsman's privilege has been dismissed as fundamentally different from those just described in that it would engender and foster undesirable alliances with the criminal underworld.<sup>288</sup> The proponents of a newsman's privilege have not rebutted this characterization of the reporter-source relationship, and have ignored the rights of the source by emphasizing the burden on the flow of the news.<sup>289</sup> Were the reporter to stress the desirability of the relationship *per se*, therefore, this final doctrinal barrier to a common law privilege would be overcome.<sup>290</sup>

Admittedly, the common law rule denying protection to the reporter-source relationship is firmly entrenched in our judicial system.<sup>291</sup> The common law, however, should not be immune to change. As was observed in *Funk v. United States*,<sup>292</sup> "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." Moreover, where the contours of the privilege are materially altered, precedents denying the privilege would no longer be controlling. To perpetuate these precedents would unduly glorify the dead hand of the common law.

#### *The Source's Privilege as a Constitutional Guarantee*

In *Branzburg v. Hayes*, the Supreme Court rejected a newsman's privilege which would inure in the reporter.<sup>293</sup> The constitutional question would be substantially different if the requested privilege vested in the source. A privilege for the source would not be inconsistent with the first

amendment concept of an "unprivileged" press. Furthermore, the argument for such a privilege would not depend on the discredited "free flow of the news theory", but rather on the source's first amendment right to anonymous speech.<sup>294</sup>

It has long been urged that the freedoms of speech and press do not extend to anonymous speech. Stressing the principle that "[t]he more we learn, the better," numerous writers have joined with Chaffee in extolling the desirability of learning the source of "literary litter."<sup>295</sup> While there is merit in the Chaffee view, his rejection of constitutional protection for anonymous speech is too absolute. Under certain circumstances, the first amendment should and does protect anonymous publication.

Anonymous speech has played a crucial role in American history. From the Federalist Papers of Hamilton, Madison, and Jay to the Letters of Pacificus by Alexander Hamilton, material published anonymously helped forge the early laws of our country.<sup>296</sup> Historical practice has gained increasing judicial sanction. In *NAACP v. Alabama ex rel. Patterson*,<sup>297</sup> the Supreme Court ruled that there are times and circumstances when States may not compel those engaged in the dissemination of ideas to be publicly identified. Other Supreme Court decisions have enunciated the doctrine that the government may not use indirect means such as exposure and public scorn to achieve results clearly prohibited by the first amendment.<sup>298</sup> The most important Supreme Court decision is the case of *Talley v. California*,<sup>299</sup> where a statute prohibiting the distribution of anonymous handbills was held void on its face on the grounds that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." Whether the *Talley* rule protects anonymity in all circumstances was left an open question, but the logic of the decision seems to limit the protection to political expression.<sup>300</sup> This right is particularly important to the

<sup>285</sup> See Coburn, *supra* note 120.

<sup>286</sup> Coburn, *supra* note 120, at 607-08.

<sup>287</sup> Hunt v. Blackburn, 128 U.S. 464, 470 (1883).

<sup>288</sup> Cf. Gallup, *supra* note 53, at 27.

<sup>289</sup> Guest & Stanzler, *supra* note 53, at 27.

<sup>290</sup> For a discussion of the desirability of the relationship *per se*, see text accompanying note 302 *infra*.

<sup>291</sup> Cf. note 127 *supra*.

<sup>292</sup> 290 U.S. 371, 383 (1933).

<sup>293</sup> 408 U.S. at 695: "We note first that the privilege claimed is that of the reporter, not the informant . . ." Cf. Guest & Stanzler, *supra* note 53, at 45 n.138: "The purpose of the newsman's privilege is not to protect the source . . . , but to promote the flow of the news."

<sup>294</sup> See generally Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961).

<sup>295</sup> Chaffee, *supra* note 114, at 490 n.7.

<sup>296</sup> Comment, *The Constitutional Right to Anonymity*, *supra* note 294, 15 1085.

<sup>297</sup> 357 U.S. 449, 462 (1958).

<sup>298</sup> See, e.g., *Shelton v. Tucker*, 362 U.S. 60 (1960); *Barrenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>299</sup> 362 U.S. 60, 65 (1960).

<sup>300</sup> Comment, *Government Investigations*, *supra* note 38, at 1228.

news source who expresses an unpopular view, since he is an especially probable object of criticism and reprisal.<sup>301</sup> To a large degree, the first amendment protections were forged for the rebel and the heretic.<sup>302</sup>

The source, of course, cannot personally assert his right to anonymous publication and still retain his anonymity. Accordingly, the newsman should have standing to assert the rights of his source. Using the standard articulated by the Supreme Court in *Baker v. Carr*,<sup>303</sup> the newsman is a proper representative party. Since he is injured by compulsory disclosure, the reporter has the adversity which is the "gist of the question of standing."<sup>304</sup> Standing for the newsman can also be premised on the rationale of *NAACP v. Alabama ex rel. Patterson*,<sup>305</sup> in which the Supreme Court explained that if the members of the NAACP were constitutionally entitled to anonymity, the Association would have standing to assert this right

<sup>301</sup> Note, HARV. L. REV., *supra* note 247, at 1399.

<sup>302</sup> Comment, *The Constitutional Right to Anonymity*, *supra* note 294, at 1109 n.149.

<sup>303</sup> 369 U.S. 186 (1962).

<sup>304</sup> *Id.* at 204.

<sup>305</sup> 357 U.S. 449 (1958).

for them. The reasoning of the Court applies with equal force to the reporter's assertion of the rights of his source: requiring the source to assert the right himself "would result in nullification of the right at the very moment of its assertion."<sup>306</sup> Some protection for the reporter-source relationship was granted in *Branzburg v. Hayes*, where the newsmen asserted the public's right to a free flow of the news. This protection can be supplemented if reporters assert the source's right to anonymous speech.

#### CONCLUSION

Several centuries ago, the journalist had his ears lopped off for publishing a libel.<sup>307</sup> Today, the reporter is still being denied his right to hear. Moreover, the individual who has vital political information is being denied his right to express himself anonymously through the medium of the press. Stressing the first amendment rights of the source constitutes the most compelling justification for judicial expansion of a "novel" privilege.

<sup>306</sup> *Id.* at 459.

<sup>307</sup> F. THAYER, *LEGAL CONTROL OF THE PRESS* 9-10 (2d ed. 1950).

## THE RIGHT TO APPEAR PRO SE: THE CONSTITUTION AND THE COURTS

In 1942 the United States Supreme Court rendered two important decisions relating to the right to counsel in criminal trials. The Court declared in *Betts v. Brady*<sup>1</sup> that the sixth amendment right to counsel applied only to trials in federal courts and did not require state courts to supply lawyers for all indigents who desired an attorney. Several months later, in *Adams v. United States ex rel. McCann*,<sup>2</sup> the Court appeared to uphold the right of an accused to reject the assistance of a lawyer in order to proceed *pro se*. While the Court's decision in *Adams* passed with little notice, *Betts v. Brady* had an immediate impact. To some it seemed that the Supreme Court had retreated from its earlier pronouncement in *Powell v. Alabama*<sup>3</sup> that a state court had a duty to assign counsel to those unrepresented in order to insure a fair hearing.<sup>4</sup> *Betts* seemed a rejection of the Court's reasoning in *Johnson v. Zerbst*<sup>5</sup> which stressed the necessity of appointing counsel in federal trials on the basis of "the obvious truth that the average defendant [does] not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty."<sup>6</sup>

<sup>1</sup> 316 U.S. 455 (1942).

<sup>2</sup> 317 U.S. 269 (1942).

<sup>3</sup> 287 U.S. 45 (1932).

<sup>4</sup> *Id.* at 68-69. Mr. Justice Sutherland's words on the relationship of the right to counsel to a fair hearing have long since become famous:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon improper evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both skill and knowledge to adequately prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every stage in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, of those of feeble intellect. *Id.* In *Betts v. Brady*, 316 U.S. 455, 462 (1942), the Supreme Court limited the holding in *Powell* to its facts and stated that the defendant bore the burden of proving that the absence of counsel deprived him of a fair trial.

<sup>5</sup> 304 U.S. 458 (1938).

<sup>6</sup> *Id.* at 462-63.

*Betts* remained good law for twenty years, but in *Gideon v. Wainwright*<sup>7</sup> the Supreme Court overruled it, declaring that the sixth amendment right to counsel was binding on the states as "fundamental and essential to a fair trial."<sup>8</sup> With the demise of *Betts* and the triumph of the right to counsel, *Adams v. United States ex rel. McCann*<sup>9</sup> came in for closer scrutiny, a scrutiny given added urgency by the demands of defendants in publicized trials to appear without legal assistance. Both courts and commentators explored the thrust of the right to appear *pro se* and the tension between this right and the sixth amendment right to assistance of counsel.<sup>10</sup> The result was a controversy as to whether there is a constitutional right to proceed without a lawyer and, if so, the exact source in the Constitution of that right. This comment will explore the dimensions of the controversy and its ramifications.

Any discussion of this topic must begin with *Adams v. United States ex rel. McCann*.<sup>11</sup> In *Adams* the Supreme Court considered the claim that an accused could not waive trial by jury unless he acted upon a lawyer's advice. Writing for the Court, Mr. Justice Frankfurter struck down this contention as fallacious and then commented on the right to appear without a lawyer.<sup>12</sup> He viewed the right to appear *pro se* as "correlative" to the right to the assistance of counsel and as resting upon considerations that went to the substance of an accused's position before the law. Frankfurter felt that because the public conscience had to be satisfied that fairness dominated the administration of justice, a defendant had to have the means of presenting his best defense.<sup>13</sup> He stated

<sup>7</sup> 372 U.S. 335 (1963).

<sup>8</sup> *Id.* at 342-43.

<sup>9</sup> 317 U.S. 269 (1942).

<sup>10</sup> See, e.g., Garcia, *Defense Pro Se*, 23 U. MIAMI L. REV. 551 (1969); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Riddle, *The Right to Defend Pro Se*, 3 TEXAS TECH. L. REV. 89 (1971); Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479 (1971); Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1965); Note, 48 N.C.L. REV. 678 (1970).

<sup>11</sup> 317 U.S. 269 (1942).

<sup>12</sup> *Id.* at 275.

<sup>13</sup> *Id.* at 279-80.



that leaving the choice of means to the accused was an essential aspect of fairness.<sup>14</sup> He depicted this element of choice as crucial to understanding the constitutional safeguards of the rights of a defendant. "To deny an accused a choice of procedure in circumstances in which he, though a layman, is capable . . . of making an intelligent choice," was, according to Frankfurter, "to impair the worth of great Constitutional safeguards by treating them as empty verbalisms."<sup>15</sup> The Constitution did not force a lawyer upon a defendant. He might waive his constitutional right to assistance "if he [knew] what he [was] doing and his choice [was] made with eyes open."<sup>16</sup>

While Frankfurter's dictum in *Adams* remained the most complete statement on the status of the right to defend without counsel, the Supreme Court returned to the question in following years, always dealing with it tangentially but always supporting the fundamental nature of the right. In *Carter v. Illinois*,<sup>17</sup> decided four years after *Adams*, the Court considered the right in a case involving the defendant's claim that he had been improperly denied the assistance of counsel when pleading guilty to a charge of murder. Although the Court declared that the defendant did have a right to counsel at every stage of his defense, it found that the accused had waived counsel by not requesting assistance.<sup>18</sup> The Court went on to assert that the defendant might make his own defense:

Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or confess his guilt.<sup>19</sup>

Two years later, Mr. Justice Murphy, a dissenter in *Carter*, indicated that he agreed with his colleagues' classification of the right to defend *pro se* as a right of fundamental character. In his opinion for the Court in *Price v. Johnson*,<sup>20</sup> Justice Murphy dismissed the claim that a prisoner had the right to argue his own appeal or be present at appellate proceedings as different from a defendant's constitutional prerogative to be present at every significant stage of his felony prosecution or "his recognized privilege of conducting his own defense

at trial."<sup>21</sup> In *Moore v. Michigan*,<sup>22</sup> the Court held that the defendant had a constitutional right to counsel at the time of his guilty plea, but stressed that the right did "not justify forcing counsel upon an accused who wants none."<sup>23</sup>

The Supreme Court's few and sometimes cryptic comments concerning the right to appear *pro se* have left comprehensive discussion of the subject to the lower courts, both state and federal. It is here that the parameters of the dispute have been articulated. The United States Court of Appeals for the Second Circuit presented the strongest argument in favor of the constitutional stature of the right to dispense with a lawyer's assistance in *United States v. Plattner*.<sup>24</sup> In that case, the petitioner had been assigned a lawyer for a *coram nobis* hearing despite his insistent requests that he be allowed to represent himself. The court held that the district court had erred in denying the petitioner's request. It reversed the lower court's dismissal of Plattner's petition and remanded the case for rehearing. The Second Circuit declared that the appellant did not have to show prejudice from the district court's refusal to allow him to plead his own case because the right to act *pro se* in a criminal trial was "a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision."<sup>25</sup>

While the Second Circuit relied heavily upon Frankfurter's argument in *Adams*, it also expanded upon it. According to the court of appeals, both the due process clause of the fifth amendment and the assistance of counsel provision of the sixth amendment imply the right of an accused to manage and conduct his own defense in a criminal case.<sup>26</sup> The court asserted that the right to counsel, while included in the Constitution "to buttress and supplement all the other rights of a defendant charged with crime," was "surely not intended to limit in any way the absolute and primary right to conduct one's own defense *in propria persona*."<sup>27</sup> The court pointed to section 35 of the Judiciary Act of 1789 as proof of its contention. Signed into law by President George Washington one day before the sixth amendment was proposed in Congress, section 35 declared that in all federal courts

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 280.

<sup>16</sup> *Id.*

<sup>17</sup> 329 U.S. 173 (1946).

<sup>18</sup> *Id.* at 177.

<sup>19</sup> *Id.* at 174.

<sup>20</sup> 334 U.S. 266 (1948).

<sup>21</sup> *Id.* at 285.

<sup>22</sup> 355 U.S. 155 (1957).

<sup>23</sup> *Id.* at 161.

<sup>24</sup> 330 F.2d 271 (2d Cir. 1964).

<sup>25</sup> *Id.* at 273.

<sup>26</sup> *Id.* at 274.

<sup>27</sup> *Id.*

the parties were entitled to "plead and manage their own cases personally" or with the assistance of counsel.<sup>28</sup> By such language, the court in *Plattner* contended, section 35 gave meaning to the "terse" language of the sixth amendment and indicated that the constitutional right to the assistance of counsel was intended to include the right to defend *pro se*.<sup>29</sup> The court directed attention to rule 44 of the Federal Rules of Criminal Procedure which stipulates that a defendant has the right to refuse counsel.<sup>30</sup> Also, it noted that the constitutions of thirty-seven states guaranteed that right.<sup>31</sup>

While many jurisdictions accept the premise that the right of self-representation is one of constitutional dimension, none view it as an absolute privilege.<sup>32</sup> Virtually all courts and commentators agree that in order to exercise the right a defendant must be *sui juris* and, in keeping with the language

<sup>28</sup> *Id.* See 28 U.S.C. § 1654 (1970) which is the modern equivalent of section 35 and uses essentially the same language.

<sup>29</sup> 330 F.2d at 274.

<sup>30</sup> *Id.* at 275. FED. R. CRIM. P. 44:

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

<sup>31</sup> 330 F.2d at 274. At present, six state constitutions guarantee the accused in a criminal prosecution the right to be heard either by himself, counsel or both: ALA. CONST. art. 1, § 6; FLA. CONST. DEC. OF RIGHTS, § 11; ME. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; TEX. CONST. art. 1, § 8; S.C. CONST. art. 1, § 18.

Twenty-six state constitutions protect the right of a criminal defendant to be heard in person and by counsel: ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 9; DEL. CONST. art. 1, § 7; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1, § 8; IND. CONST. art. 1, § 13; KY. CONST. BILL OF RIGHTS, § 11; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 3, § 16; NEV. CONST. art. 1, § 18; N.H. CONST. BILL OF RIGHTS, art. 15; N.M. CONST. art. 2, § 23; N.Y. CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. 1, § 11; PA. CONST. art. 1, § 8; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1, § 9; UTAH CONST. art. 1, § 10; VT. CONST. chap. 1, art. 10; WIS. CONST. art. 1, § 7; WYO. CONST. art. 1, § 10. See also LA. CONST. art. 1, § 9.

Four states provide for the right to appear and defend in person or by counsel: KAN. CONST. BILL OF RIGHTS, § 10; MASS. CONST. part 1, art. 12; NEB. CONST. art. 1, § 11; WASH. CONST. art. 1, § 22.

<sup>32</sup> For courts accepting the right, see *Haslam v. United States*, 431 F.2d 362, 365 (9th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971); *United States v. Warner*, 428 F.2d 730, 733 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); *Lowe v. United States*, 418 F.2d 100, 103 (7th Cir. 1969); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969); *Juelich v. United States*, 342 F.2d 29, 31 (5th Cir. 1965); *United States v. Johnson*, 333 F.2d 1004, 1005 (6th Cir. 1964).

of *Johnson v. Zerbst*,<sup>33</sup> must waive the right to counsel intelligently and competently.<sup>34</sup> Although there is considerable debate over exactly what constitutes an "intelligent and competent" waiver,<sup>35</sup> most federal courts that have dealt with the subject have stipulated that the crucial factor is whether the defendant fully understands the consequences of his decision.<sup>36</sup> Most agree that there can be no hard and fast rule as to what constitutes a valid waiver. Rather its validity must depend upon the circumstances of the particular case and a defendant should not arbitrarily be prevented from exercising his right to represent himself.<sup>37</sup>

The courts look much less charitably upon a represented defendant's right to waive counsel once the trial has begun. Even the Second Circuit, which authored the *Plattner* decision, declared that while the right of a criminal defendant to act as his own lawyer was "unqualified" if invoked prior to the start of trial, once the trial had begun with representation, his right to waive counsel was sharply curtailed.<sup>38</sup> The court asserted that a denial of a defendant's mid-trial demand to dismiss his lawyer was reversible error only if the defendant

<sup>33</sup> 304 U.S. 458 (1938).

<sup>34</sup> *Id.* at 456.

<sup>35</sup> For an example of a jurisdiction where the judges disagreed as to what constituted a waiver see *United States ex rel. Minor v. Erickson*, 428 F.2d 623 (8th Cir. 1970); *United States v. Warner*, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970). See also Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1965) for a discussion of what factors should be considered in determining the validity of a waiver.

<sup>36</sup> In *Hodge v. United States*, 414 F.2d 1040, 1043 (9th Cir. 1969), the court of appeals concisely expressed the standard to be followed:

The question before the judge was not whether the defendant was professionally capable of acting as his own lawyer. Few defendants are, and the right of representation is not so conditioned. The question was simply whether the defendant understood the charges against him and was fully aware of the fact that he would be on his own in a complex area where experience and professional training are greatly to be desired.

See also *United States v. Warner*, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); *Lowe v. United States*, 418 F.2d 100 (7th Cir. 1969); *Arnold v. United States*, 414 F.2d 1056 (9th Cir. 1969); *United States v. Johnson*, 333 F.2d 1004 (6th Cir. 1964).

<sup>37</sup> This is in keeping with *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), which mandated that the determination of whether or not there had been an intelligent waiver of counsel must depend in each instance "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

<sup>38</sup> *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

could demonstrate that the prejudice to his interests occasioned by such a denial overbalanced "the potential disruption of proceedings already in progress."<sup>39</sup> Most courts use this "potential disruption" test, some adding variations of their own.<sup>40</sup>

The acceptance of the constitutional basis of the right to appear *pro se* has not been unanimous.<sup>41</sup> In *People v. Sharp*<sup>42</sup> the California supreme court not only provided the most recent attack on the theory that the United States Constitution protected the right of one criminally charged to plead his own cause without the aid of counsel,<sup>43</sup> but it also gave judicial sanction to an amendment to the state constitution which took away the right to proceed *pro se* in a criminal prosecution.<sup>44</sup>

Jerome Sharp was charged with grand theft. After the defendant and his court-appointed lawyer waived trial by jury, the court found Sharp guilty and sentenced him to prison. On appeal, Sharp claimed that the trial court had erred prejudicially in refusing to permit him to represent himself at trial. The California supreme court disagreed. Looking to England in pre-colonial time and to

American colonial declarations of rights, the court did not find any concrete evidence as to the fundamental nature of the right of self-representation in criminal trials.<sup>45</sup> Examining the sixth amendment itself, the court discerned nothing in the express language of the Constitution to support the contention that an accused had a constitutional right to defend without counsel.<sup>46</sup>

While it tended to dismiss Justice Frankfurter's language in *Adams* as dictum, the California supreme court agreed that the right to counsel, like other constitutional rights, could be waived.<sup>47</sup> Nevertheless, the court averred that the ability to waive a constitutional protection was not itself necessarily a right of constitutional proportions.<sup>48</sup> The court believed that the situation in *Sharp* was analogous to that in *Singer v. United States*,<sup>49</sup> a case in which the defendant questioned the constitutionality of rule 23(a) of the Federal Rules of Criminal Procedure. Rule 23(a) stipulated that a jury trial could be waived by a defendant only with the approval of both the presiding judge and the prosecutor.<sup>50</sup> The defendant in *Singer* claimed that because the right to waive a jury was a corollary to the constitutional right to a jury trial, it could not be conditioned on anyone's approval. The United States Supreme Court rejected this position. In an opinion written by Chief Justice Warren, the Court argued that the ability to waive a constitutional right did not ordinarily carry with it the opposite of that right.<sup>51</sup> Warren emphasized that the Constitution established trial by jury as the "normal" and "preferable" mode of dispensing with issues of fact in criminal cases.<sup>52</sup>

A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning the waiver on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the constitution guarantees him.<sup>53</sup>

<sup>45</sup> 7 Cal. 3d at 454, 499 P.2d at 492, 103 Cal. Rptr. at 236.

<sup>46</sup> *Id.* at 455, 499 P.2d at 493, 103 Cal. Rptr. at 237.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 380 U.S. 24 (1965).

<sup>50</sup> Fed. R. Crim. P. 23(a):

Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

<sup>51</sup> 380 U.S. at 34-35.

<sup>52</sup> *Id.* at 35.

<sup>53</sup> *Id.* at 36.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> See, e.g., *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *Sanchez v. United States*, 311 F.2d 327 (9th Cir. 1962), *cert. denied*, 373 U.S. 949 (1963). For a good discussion of some of these variations see Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1181-84 (1970).

<sup>41</sup> For examples of decisions rejecting the constitutional basis of the right see *Van Nattan v. United States*, 357 F.2d 161, 163-64 (10th Cir. 1966); *Butler v. United States*, 317 F.2d 249, 258 (8th Cir. 1963); *Brown v. United States*, 264 F.2d 249, 258 (D.C. Cir. 1959).

<sup>42</sup> 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), *cert. denied*, 93 S. Ct. 1380 (1973).

<sup>43</sup> For earlier attacks see the cases cited in note 41 *supra*.

<sup>44</sup> CAL. CONST. art. 1, § 13. Section 13 was amended by the adoption of Proposition 3 at the California primary election of June 6, 1972 to take effect on June 7, 1972. The amendment was proposed by Senate Constitutional Amendment No. 42, 1971 Regular Session. As amended, section 13 now provides in pertinent part:

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and a public trial and to have the assistance of counsel for his defense; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and to be personally present with counsel. . . . The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel. . . .

[Provisions deleted from section 13 as it appeared at the time of *Sharp* and prior to the amendment are printed in *Strikeout* type; inserted or added provisions are italicized.] See 7 Cal. 3d at 464, 499 P.2d at 498-99, 103 Cal. Rptr. at 242-43.

The court in *Sharp* picked up Chief Justice Warren's language in *Singer* and, while admitting that it did not address itself to the right to counsel, concluded that there was no good reason why the waiver of the sixth amendment right to counsel was a constitutional right when waiver of the sixth amendment right to trial by jury was not.<sup>54</sup> In both, a refusal for good cause to allow the waiver only rendered the accused that which the Constitution expressly guaranteed him.<sup>55</sup>

The California supreme court's reliance upon *Singer v. United States* is not well founded. The United States Constitution treats the right to counsel quite differently from the right to trial by jury.<sup>56</sup> In addition to the sixth amendment guarantee of a speedy trial by an impartial jury, article III, section 2 requires that the trial of all crimes, except impeachment, shall be by jury.<sup>57</sup> No similar directory language is used with regard to counsel. The sixth amendment guarantees only the *assistance* of counsel. The majority in *Singer* apparently recognized the difference between the two rights. Although they mentioned waiver of counsel as one of those constitutional rights "subjected to reasonable procedural regulations," the Court did not include it with trial by jury as one of those rights which does not ordinarily carry with it the right to insist on the opposite of the right.<sup>58</sup> This failure to include the right to counsel takes on added significance in view of the Court's words in *Adams v. United States ex rel. McCann*<sup>59</sup> to the effect that no court can force a lawyer upon a defendant.<sup>60</sup>

The difference between the right to a jury trial and the right to counsel is also manifested in the history of the two guarantees. In *Singer*, the Supreme Court traced the history of the right to trial by jury from its early English beginnings as an alternative to trial by battle, ordeal or compur-

gation, through the American colonial experience, to the drafting of the federal Constitution.<sup>61</sup> The Court concluded that at the time of the constitutional convention there was little if any recognition of a defendant's right to trial by a court sitting without a jury and that consequently this option was not intended to be an integral part of the right to jury trial guaranteed by article III or the sixth amendment.<sup>62</sup>

In *Sharp*, the California court pursued a similar historical analysis in reference to the right of self-representation and arrived at a similar conclusion—that such a right was not recognized prior to the drafting of the Constitution and thus was not intended by the founding fathers to be a right implied by the sixth amendment or any other provision of the Constitution.<sup>63</sup> This conclusion rests upon a faulty reading of history. The California supreme court was correct in asserting that in both England and colonial America self-representation probably was commonplace,<sup>64</sup> but the court was wrong in concluding that the concept of a fundamental right of self-representation was but a "vague" notion at the time of the signing of the Constitution.<sup>65</sup> On the contrary, although the right was rarely articulated as such, it was widely ac-

<sup>54</sup> 380 U.S. at 27-34.

<sup>55</sup> *Id.* at 31.

<sup>56</sup> 7 Cal. 3d at 353-54, 499 P.2d at 492, 103 Cal. Rptr. at 236.

<sup>57</sup> In England, the early identification of the Crown's interests with those of the prosecution in criminal trials limited the defendant's right to the aid of counsel. While those accused of misdemeanors could retain counsel from a very early period and those charged with treason were granted the right in the middle of the Eighteenth Century, felony defendants were not accorded the right to counsel until 1836. Prior to that year, however, many English judges allowed counsel to argue points of law, to examine and cross-examine witnesses and do everything for the accused except address the jury. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 192 (1924) [hereinafter cited as HOLDSWORTH]; 6 HOLDSWORTH 234 (1924); 9 HOLDSWORTH 235 (1926); 11 HOLDSWORTH 550-51 (1926). See also J. GRANT, OUR COMMON LAW CONSTITUTION 5-10 (1960).

In the American colonies, the right to counsel was less circumscribed than in England, but the limited supply of lawyers left most defendants to defend themselves. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 25 (1955). See T. NAUGHTON & J. GOEBEL, JR., LAW ENFORCEMENT IN COLONIAL NEW YORK 573-74 (1944); H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 67-123 (1965); A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 77-79 (1930); C. WARREN, A HISTORY OF THE AMERICAN BAR 3-18 (1911).

<sup>65</sup> 7 Cal. 3d at 454, 499 P.2d at 492, 103 Cal. Rptr. at 236.

<sup>54</sup> 7 Cal. 3d at 455, 499 P.2d at 493, 103 Cal. Rptr. at 237.

<sup>55</sup> *Id.*

<sup>56</sup> The following discussion of the difference in treatment afforded by the United States Constitution to the right to trial by jury and the right to assistance of counsel relies on the excellent discussion in Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479, 1488-89 (1971).

<sup>57</sup> U.S. CONST. art. III, § 2.

<sup>58</sup> The Court did include the right to a public trial, the right to be tried in the state and district where the crime was committed, and the right to be confronted by witnesses as rights that do not ordinarily carry with them their opposite. 380 U.S. at 35.

<sup>59</sup> 317 U.S. 269 (1942).

<sup>60</sup> *Id.* at 279.

knowledge and cherished as a fundamental right.<sup>66</sup>

The Puritans who settled in Massachusetts Bay brought with them a hatred of lawyers that was exceeded only by their love and fear of God.<sup>67</sup> In the first official compilation of the laws of the colony they forbade attorneys from taking fees for their labor<sup>68</sup> and in a later statute forbade lawyers from sitting in the legislature.<sup>69</sup> This antipathy was reflected in virtually all of the colonies, often finding expression in legislation. As early as 1677, the Concessions and Agreements of West New Jersey provided "that no person shall be compelled to fee any attorney or councillor to plead his cause, but that all persons have free liberty to plead his own cause, if he pleases."<sup>70</sup> Five years later, the Pennsylvania Frame of Government (1682) included the provision that "in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their cause themselves; or, if unable, by their friends . . ."<sup>71</sup>

In the flurry of state constitution-making which followed the Declaration of Independence, the right of self-representation was not forgotten. Article IX of the Pennsylvania Declaration of Rights (1776) guaranteed that "in all prosecutions

for criminal offenses, a man hath a right to be heard by himself and his counsel."<sup>72</sup> The constitutions of Vermont (1777)<sup>73</sup> and New Hampshire (1783)<sup>74</sup> had similar provisions, while the citizens of Massachusetts adopted a slightly altered version.<sup>75</sup> The Georgia Constitution of 1777, in attempting to control the unauthorized practice of law, stressed that its strict provisions against unlicensed practitioners were "not intended to exclude any person from the inherent privilege of every freeman, the liberty to plead his own cause."<sup>76</sup>

While the paucity of information makes it difficult to determine the exact status of the right to proceed *pro se* in the constitutional schema of the new states, available data supports the conclusion that it was a highly valued right. In a pamphlet defending the Pennsylvania Constitution of 1776, which he had helped draft, Thomas Paine considered the status of the right of self-representation:

Either party . . . has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, nay, they may be dumb, therefore the civil right of pleading by proxy, that is, by a counsel, is an appendage of the natural right. . . .<sup>77</sup>

A decade after Paine penned these words, farmers and revolutionary war veterans of the western counties of Massachusetts took up arms against what they considered an oppressive state government. Among the demands most frequently pressed by these dissidents were abolition of the legal profession and representation of their own interests in court.<sup>78</sup> While this insurrection, known as Shays' Rebellion, provided impetus to the call

<sup>72</sup> *Id.* at 265.

<sup>73</sup> *Id.* at 323.

<sup>74</sup> *Id.* at 377.

<sup>75</sup> *Id.* at 342. The Massachusetts Declaration of Rights declared that "every subject" had the right "to be fully heard in his defence by himself, or his counsel, at his election."

<sup>76</sup> *Id.* at 300.

<sup>77</sup> *Id.* at 315-16.

<sup>78</sup> See Instructions of the Town of East Sudbury to its Representative, Joseph Curtis, Esq., on file in Massachusetts Archives, MA:A:Doc., 2305; Instructions of the Town of Acton, June 12, 1786, in Shays' Rebellion MSS, on file with American Antiquarian Society, Worcester, Mass.; Instructions of the Town of Stoughton to its Representative, James Endicott, May 17, 1786, quoted in D. HUNTOON, HISTORY OF THE TOWN OF CANTON 428 (1893). For the role of anti-lawyer feeling in Shays' Rebellion see Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, 14 AM. J. LEGAL HIST. 283 (1970); Smith, *Features of Shays' Rebellion*, 8 WM. & MARY QUART. 77 (1948).

<sup>66</sup> The assumption of the California supreme court seems to be that because the right to appear *pro se* was not often articulated, it was not widely acknowledged. It should be pointed out that some rights, e.g., the right to "life, liberty, and the pursuit of happiness," are considered so basic that they do not have to be articulated and seldom are.

<sup>67</sup> C. WARREN, A HISTORY OF THE AMERICAN BAR 7 (1911). These refugees believed that they had suffered under the existing system of justice in England and blamed the lawyers, as agents of that system, for much of their distress. In addition, many of them probably looked upon lawyers in England as virtually synonymous with the "cringing" attorneys of the Crown and the arbitrary justices of the King's courts who seemed bent upon the perversion of justice and the conviction of all who opposed the Stuart prerogative.

<sup>68</sup> Section 26 of Nathaniel Ward's *Body of Liberties* (1641), the first official compilation of the laws of Massachusetts, stipulated:

[E]very man who findeth himself unfit to plead his own cause in any Court shall have Libertie to employ any man against whom the Court doth not except, to help him Provided he give noe fee or reward for his paines.

COLONIAL LAWS OF MASSACHUSETTS 39 (W. Whitmore ed. 1889).

<sup>69</sup> 4 RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND 87 (N. Shurtleff ed. 1853-54).

<sup>70</sup> 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129 (1971).

<sup>71</sup> *Id.* at 140.

for a constitutional convention,<sup>79</sup> most of its adherents opposed the ratification of the Constitution without a Bill of Rights, including the right to assistance of counsel. In requiring recognition of this right, however, it is doubtful that these insurrectionists or their countrymen would have acknowledged any diminishment of the fundamental character of the right to appear *pro se*.

To say that Eighteenth Century Americans regarded the right of one accused to appear *pro se* as a right of fundamental stature is not to say that this privilege is automatically guaranteed by the Constitution. The inference that it is so guaranteed may be a sound one, but it must be supported by words in the Constitution itself. Justice Frankfurter's opinion in *Adams v. United States ex rel. McCann*<sup>80</sup> found the requisite support in the sixth amendment, the only part of the Constitution which mentions counsel. Yet the sixth amendment right refers only to the "assistance of counsel." While Frankfurter extrapolated from these words the corollary that the right to assistance of counsel included the right to reject such assistance,<sup>81</sup> this seems a heavy load to drape on the bare bones of the sixth amendment alone, especially in view of the antagonistic relationship of the two rights.<sup>82</sup> Even discounting the Supreme Court's argument in *Singer v. United States* that the mere guarantee of a right does not ordinarily carry with it a guarantee of the opposite of that right,<sup>83</sup> it appears that the Court's rationale in the right to counsel cases—*Powell v. Alabama*,<sup>84</sup> *Johnson v. Zerbst*<sup>85</sup> and *Gideon v. Wainwright*<sup>86</sup>—makes this antagonistic relationship crucial. If this rationale is correct in its salient thrust that the right to counsel is one of the safeguards "necessary to insure the fundamental human rights of life and liberty" <sup>87</sup> and is "fundamental and essential to a fair trial," <sup>88</sup> it is difficult to conceive how the right to reject counsel could, by virtue of its opposite relationship alone, be a constitutional right emanating from the same source.

Although the sixth amendment right to counsel

<sup>79</sup> R. TAYLOR, *WESTERN MASSACHUSETTS IN THE REVOLUTION* 168 (1954).

<sup>80</sup> 317 U.S. 269 (1942).

<sup>81</sup> *Id.* at 279. See text accompanying notes 12-16 *supra*.

<sup>82</sup> The discussion that follows was outlined to some extent in Note, 48 N.C.L. REV. 678, 682 (1970).

<sup>83</sup> 380 U.S. 24 (1965).

<sup>84</sup> 287 U.S. 45 (1932).

<sup>85</sup> 304 U.S. 458 (1938).

<sup>86</sup> 372 U.S. 335 (1963).

<sup>87</sup> 304 U.S. at 462.

<sup>88</sup> 372 U.S. at 342.

is essential for due process and the right to proceed *pro se* is neither correlative to that right nor expressly mentioned in the Constitution, the right to defend *pro se* is, nevertheless, a constitutional mandate. Due process in its procedural sense is not confined to the contours expressly outlined in the Constitution.<sup>89</sup> The Supreme Court, on occasion, has gone beyond the Constitution's extensive list of due process limitations to draw from non-constitutional sources. While early cases identified those sources as the "settled usages and modes of proceeding transplanted from England to America," <sup>90</sup> in recent years the Court has employed the "fair trial" test to invalidate, on due process grounds, procedure in criminal cases which is not specifically forbidden by constitutional provisions.<sup>91</sup>

In applying the "fair trial" test, the Court, in effect, measures the procedure against the requirement that it not detract from the viability of the judicial process, a viability dependent upon the community's belief that the system will resolve disputes as quickly and as justly as possible. In criminal cases, such viability is directly related to the public's faith that the government, which enjoys such an obvious power advantage over an accused, will act in a responsible manner and that the defendant will have the opportunity to present his best defense.<sup>92</sup>

The right to appear *pro se* bears directly upon this last point—the defendant's opportunity to

<sup>89</sup> For an excellent discussion of the due process clause in general and the non-constitutional sources of due process limitations in particular, see Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968).

<sup>90</sup> *De ex dem Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). See *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>91</sup> On such grounds the Court proscribed the knowing use of false evidence by the prosecution in *Miller v. Pate*, 386 U.S. 1 (1967); non-disclosure by the prosecution of probative exculpatory evidence in *Giles v. Maryland*, 386 U.S. 66 (1967); "non-rational" presumptions tending to shift the burden of proof to the defendant in *United States v. Romano*, 382 U.S. 136 (1965); and trial by a predisposed judge in *In re Murchison*, 349 U.S. 133 (1955). See Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968).

<sup>92</sup> Many of the safeguards of the Bill of Rights are directed toward permitting the defendant to present his best defense. The sixth amendment, for example, allows the accused sufficient notice to prepare his defense ("the accused shall be informed of the nature and cause of the accusation"), and opportunity to discover and present relevant evidence ("the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor") and to test adverse evidence ("the accused shall enjoy the right to . . . be confronted by the witnesses against him").

present his best defense. Some commentators argue that in view of the potential complexity of even minor criminal prosecutions, a defendant cannot possibly present his best defense without the assistance of counsel. Therefore, due process holds that it is absurd for an accused to proceed without counsel; a defendant through ignorance, vanity or stupidity should not be allowed to cut his own throat.<sup>93</sup> One commentator suggests that such a result only serves to discredit the judicial system in the eyes of the community.<sup>94</sup> He insists that even if a due process right to appear *pro se* existed at some time in the distant past, changes in criminal procedure have rendered it an obsolete and dangerous relic.<sup>95</sup>

These contentions miss the point. As the Second Circuit argued in *United States ex rel. Maldonado v. Denno*,<sup>96</sup> a defendant cannot present his best defense if he is forced to accept the services of a lawyer who does not enjoy his confidence. Distrust of lawyers, so manifest in colonial times, is far from moribund today, especially among members of minority groups and those with unpopular political beliefs.<sup>97</sup> When unwilling defendants are represented by counsel the result often is turmoil, conflict, and injury to the public esteem of the courts. Furthermore, *pro se* defendants are not as helpless as critics contend. Although not required to do so, trial courts often aid the defendant in the presentation of his case by advising him as to procedure, relaxing the rules of evidence, and protecting his rights by objecting to improper actions by the prosecutor.<sup>98</sup> Frequently this latter practice is unnecessary because prosecutors, strenuously attempting to avoid error and arouse the sympathy of the jury for the accused, take great pains to protect the rights of the *pro se* defendant.<sup>99</sup>

Despite the efforts of the judge and the prose-

cutor, most defendants who waive counsel lose at trial.<sup>100</sup> Many probably would have been acquitted if they had retained an attorney. However, this is insufficient justification for forcing a lawyer on every defendant. Due process is involved only marginally with who wins or who loses; its primary focus is on how the accused was brought to trial and how his case was tried. The judicial system's credibility depends upon this. Crucial to this credibility is the defendant's own determination of his defense, *i.e.*, his trial strategy, his theory of defense, his decision whether or not to take the witness stand. The choice should be left to him because he has the most to lose if the choice is wrong and the community-at-large must not be allowed to believe that the fate of an accused was sealed before trial began due to government dictation as to methods of defense.<sup>101</sup> The same due process considerations that allow a defendant to choose his defense also require that he be allowed the choice of representing himself. Without this right of choice, the defendant becomes a mere spectator at his trial, his destiny to be decided by a system over which others exercise complete control.

Such a system hardly comports with the respect for individual worth and autonomy which theoretically is one of the most cherished ideals of our society. Eighteenth Century Americans expressed this respect when they included the right to appear *pro se* in their state constitutions.<sup>102</sup> If the right is outdated, then so is the ideal which supported it. Conversely, if respect for human autonomy is still valued in this society, the right of self-representation in criminal trials must be as fundamental a right as ever, necessary in the eyes of society for a fair trial and thus an essential requirement of due process.

## APPENDIX

Because the United States Supreme Court has not as yet made any definitive statement on the

<sup>100</sup> See text accompanying note 124 *infra*.

<sup>101</sup> This was the thrust of part of Mr. Justice Frankfurter's argument in *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). See text accompanying notes 12-16 *supra*.

<sup>102</sup> This respect was the cornerstone of *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 348 U.S. 1007 (1966), where the court asserted that:

[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open."

<sup>93</sup> See, e.g., *Garcia, Defense Pro Se*, 23 U. MIAMI L. REV. 551, 557 (1969); *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1198-1207 (1970).

<sup>94</sup> *Grano, supra* note 93, at 1194-98.

<sup>95</sup> *Id.* at 1192.

<sup>96</sup> 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

<sup>97</sup> See text accompanying note 110 *infra*. For a discussion of the motivation behind requests to proceed *pro se*, see Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479, 1499 (1971).

<sup>98</sup> See text accompanying notes 119-21 *infra*. In *Gibbs v. Burke*, 337 U.S. 773, 781 (1949), the Supreme Court recognized that a trial judge "may guide a defendant without a lawyer past the errors that make trials unfair. . . ."

<sup>99</sup> See text accompanying note 122 *infra*.

constitutional basis of the right to appear *pro se*, practice regarding a criminal defendant's exercise of this option varies from jurisdiction to jurisdiction and even from trial court to trial court. In order to obtain some idea of the status of the privilege at the trial court level in at least one jurisdiction, the author conducted a survey of the trial judges of Illinois.<sup>103</sup> Of the 590 questionnaires sent out, ninety-nine were returned either partially or wholly completed.<sup>104</sup> These responses give a fairly consistent, albeit impressionistic, picture of the position of the *pro se* defendant in Illinois.

According to the judges surveyed, relatively few criminal defendants wish to proceed without counsel.<sup>105</sup> Only one judge put the number of felony defendants requesting the right at over five per cent<sup>106</sup> and while some judges estimated that over seventy-five per cent of those charged with misdemeanors opted for self-defense, the majority set the figure at somewhere below ten per cent.<sup>107</sup> These figures are mere approximations, but they would seem to indicate that courts are not being deluged with defendants demanding the right to represent themselves.

Perhaps because of the "political" trials of recent

years and the demands for *pro se* defense that often accompanied them, some commentators have suggested that requests for the right of self-representation stem from a desire to cause such an uproarious situation that reversible error is unavoidable.<sup>108</sup> Based on this survey, it appears that political motives play a minor role in *pro se* requests. While one judge did claim that *pro se* defendants wanted "to be part of the Chicago 7" and several of his colleagues listed the hope of disruption and error as the motive behind demands for self-representation,<sup>109</sup> most judges agreed that such requests stemmed from more innocent considerations. Primary among these considerations was the defendant's faith in his own innocence, a factor cited by more judges than any other.<sup>110</sup> Close behind, however, were the defendants' mistrust of lawyers and the defendants' general ignorance.<sup>111</sup> Several judges made the point that many defendants who did not qualify for appointed counsel eschewed professional legal assistance rather than pay a lawyer.<sup>112</sup> Other judges believed that the defendant's decision to defend *pro se* was an expression of his egotism or, as one judge put it, the result of the defendant's "belief in his superior intellect [and the] general stupidity of the court and attorneys generally." <sup>113</sup>

Although the constitution of Illinois grants the right to defend "in person and by counsel" <sup>114</sup> and the state's highest court has interpreted this language as a guarantee of the right to appear *pro se*,<sup>115</sup> in practice the right is very limited. Most of those judges surveyed condition permission to proceed without counsel on the seriousness of the

<sup>108</sup> See, e.g., Laub, *The Problem of the Unrepresented, Misrepresented, and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964); Riddle, *The Right to Defend Pro Se*, 3 TEXAS TECH. L. REV. 89 (1971).

<sup>109</sup> Two judges listed the hope of disruption and error as the prime motivating factors behind requests for the right of self-representation. Another judge postulated that political motivation was the chief reason for such requests.

<sup>110</sup> Twenty-three judges indicated that they believed that defendants desired to proceed without a lawyer because the accused believed strongly in his own innocence.

<sup>111</sup> Seventeen judges answered mistrust of lawyers as the primary motivation behind requests to defend *pro se*, while twelve estimated that such demands were attributable to the defendants' ignorance.

<sup>112</sup> Seven judges gave this explanation top priority.

<sup>113</sup> Five judges offered this analysis.

<sup>114</sup> ILL. CONST. art. 1, § 8.

<sup>115</sup> See *People v. Robinson*, 27 Ill. 2d 289, 179 N.E.2d 637 (1963).

<sup>103</sup> The circuit court is the trial court in Illinois and is manned by circuit judges and associate judges. The circuit judges are elected for a term of six years. Associate judges are appointed for four year terms by the circuit judges in accordance with Illinois Supreme Court Rules. The state is divided into twenty-one judicial circuits, each with a Chief Judge elected by his fellow circuit judges. The Chief Judge has general administrative authority in his circuit. He divides the work load among the circuit and associate judges with a degree of specialization germane to the particular circuit. The Chicago circuit is more specialized than other circuits. While circuit judges may hear any type of case assigned to them by the Chief Judge, associate judges may not try criminal cases in which the defendant is charged with an offense punishable by imprisonment for more than one year.

<sup>104</sup> The questionnaire is on file in the editorial offices of the Journal of Criminal Law and Criminology.

<sup>105</sup> Some commentators leave the impression that there is an increasing trend for defendants to represent themselves. See, e.g., Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964).

<sup>106</sup> Eleven judges stated that no felony defendants desired to proceed without counsel.

<sup>107</sup> Only two judges put the figure at over seventy-five per cent, while forty-six estimated that less than ten per cent of those charged with misdemeanors wished to defend themselves. See Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 584 (1963), where the results of a survey of federal district judges demonstrated that in about one-half the districts surveyed less than twenty per cent of the defendants waived the right to counsel, but in a few districts more than eighty per cent did.



alleged offense.<sup>116</sup> Some said that they insisted on representation by counsel in all felony cases, some drew the line at crimes punishable with imprisonment, and some required representation in all trials involving juries.<sup>117</sup>

Of the few defendants who are allowed to waive counsel, most plead guilty, leaving only a few, usually charged with misdemeanors, who actually go to trial alone.<sup>118</sup> They often are accorded special treatment. Although some judges stated that they did not conduct a trial involving a *pro se* defendant any differently than one in which the accused was represented by a lawyer,<sup>119</sup> most acknowledged that they modified procedure. Most judges stressed that they made a point of informing the defendant of his rights and the proper procedure to be followed at all stages of the trial.<sup>120</sup> Many asserted that they allowed greater latitude in the examination of witnesses and the admission of evidence although only one indicated that he would go so far as to throw the rules of evidence "out the window."<sup>121</sup> Several judges actively assisted the accused, including questioning witnesses and raising objections.

In response to the question of whether the prosecutor deals with a *pro se* trial in a different

<sup>116</sup> When asked why they denied requests to proceed *pro se*, eighteen judges replied that their most important consideration was the seriousness of the offense charged. Eight said it was the defendant's ignorance of the law, six stated that it was the defendant's general ignorance, and two said it was the complexity of the particular case. Several judges said that they allowed any mentally competent defendant to represent himself if he intelligently waived assistance of counsel.

<sup>117</sup> Eleven judges replied that they refused to allow any defendants charged with felonies to waive counsel. Two said that they refused if a jury trial was involved and four denied the right if a jail sentence was possible. Eleven respondents permitted *pro se* defenses only if the defendant accepted the appointment of advisory counsel.

<sup>118</sup> Forty-four of the sixty-three judges who answered the question said that over fifty per cent of their *pro se* defendants pleaded guilty. Thirty-three stated that over three-quarters of the *pro se* defendants pleaded guilty and twenty-eight stipulated that over ninety per cent of them did.

<sup>119</sup> Only four judges asserted that they did not deal with a *pro se* trial any differently.

<sup>120</sup> Twenty-one judges said that they advised the accused as to procedure and his rights.

<sup>121</sup> Fourteen respondents declared that they liberalized court procedure in trials where the accused represented himself.

manner, several judges responded in the negative.<sup>122</sup> However, more replied that they believed that the state's attorney pursued his cause with less vigor than usual, objecting less frequently and allowing the defendant greater freedom in conducting his defense.<sup>123</sup> Two judges commented that the prosecutor went to great lengths to protect the rights of the accused, strenuously attempting to avoid error and to avoid arousing the sympathy of the jury for the defendant.

Despite these efforts by both judge and prosecutor, the average *pro se* defendant does not emerge victorious. The figures for self-represented defendants are sobering. Many judges remarked that they could not remember a victorious *pro se* defendant in a felony case and virtually all of the rest put the success rate at less than five per cent. The judges varied greatly in their estimates of the number of defendants who pleaded their own causes successfully in misdemeanor trials. A few judges put the percentage of victorious defendants at higher than fifty per cent, but more put it at lower than five per cent. There was little disagreement, however, as to the reasons behind the outcome of *pro se* criminal trials. Fifty-six of the fifty-eight respondents who answered the question attributed the defeat of self-represented defendants primarily to the "obvious guilt" of the accused.<sup>124</sup> This explanation was followed in order of importance by the defendant's ignorance of the law, his general ignorance, and the complexity of the case. As far as the judges were concerned, *pro se* defendants rarely win cases; prosecutors lose them. Forty-one of the forty-six judges who replied to the question in terms of priority listed the prosecution's weak case as the main reason why the defendant was acquitted.<sup>125</sup>

<sup>122</sup> Fifteen of those judges who answered this question believed that the prosecutor treated *pro se* trials no differently than any other.

<sup>123</sup> Two judges criticized prosecutors for their lack of aggressiveness in *pro se* cases.

<sup>124</sup> Of the other two judges, one felt that most self-represented defendants lost due to their general ignorance while the other placed the blame on the accused's ignorance of the law.

<sup>125</sup> Three of the remaining four judges felt that most victorious *pro se* defendants were acquitted because, in appearing without an attorney, they won the sympathy of the jury.